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VOLUME 521

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1996

JUNE 19 THROUGH OCTOBER 1, 1997

END OF TERM

FRANK D. WAGNER

REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS*

WILLIAM H. REHNQUIST, CHIEF JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.
ANTONIN SCALIA, ASSOCIATE JUSTICE.
ANTHONY M. KENNEDY, ASSOCIATE JUSTICE.
DAVID H. SOUTER, ASSOCIATE JUSTICE.
CLARENCE THOMAS, ASSOCIATE JUSTICE.
RUTH BADER GINSBURG, ASSOCIATE JUSTICE.
STEPHEN BREYER, ASSOCIATE JUSTICE.

RETIRED

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WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.[1]
BYRON R. WHITE, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

JANET RENO, ATTORNEY GENERAL.
WALTER DELLINGER, ACTING SOLICITOR GENERAL.[2]
SETH P. WAXMAN, ACTING SOLICITOR GENERAL.[3]
WILLIAM K. SUTER, CLERK.
FRANK D. WAGNER, REPORTER OF DECISIONS.
DALE E. BOSLEY, MARSHAL.
SHELLEY L. DOWLING, LIBRARIAN.

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*For notes, see p. IV.

NOTES

[1] Justice Brennan, who retired effective July 20, 1990 (498 U. S. VII), died on July 24, 1997.

[2] Acting Solicitor General Dellinger resigned effective August 31, 1997.

[3] Mr. Waxman became Acting Solicitor General on September 1, 1997.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective September 30, 1994, viz.:

For the District of Columbia Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the First Circuit, DAVID H. SOUTER, Associate Justice.

For the Second Circuit, RUTH BADER GINSBURG, Associate Justice.

For the Third Circuit, DAVID H. SOUTER, Associate Justice.

For the Fourth Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the Fifth Circuit, ANTONIN SCALIA, Associate Justice.

For the Sixth Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, CLARENCE THOMAS, Associate Justice.

For the Ninth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Tenth Circuit, STEPHEN BREYER, Associate Justice.

For the Eleventh Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Federal Circuit, WILLIAM H. REHNQUIST, Chief Justice.

September 30, 1994.

(For next previous allotment, and modifications, see 502 U. S., p. VI, 509 U. S., p. V, and 512 U. S., p. V.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1996

UNITED STATES *v.* ALASKA

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 84, Orig. Argued February 24, 1997—Decided June 19, 1997

This suit involves a dispute between the United States and Alaska over the ownership of submerged lands along the State's Arctic Coast. The Alaska Statehood Act expressly provides that the federal Submerged Lands Act applies to Alaska. The latter Act entitles Alaska to submerged lands beneath tidal and inland navigable waters and submerged lands extending three miles seaward of the State's coastline. The United States claims a right to offer lands in the Beaufort Sea for mineral leasing, and Alaska seeks to quiet its title to coastal submerged lands within two federal reservations, the National Petroleum Reserve-Alaska (Reserve) and the Arctic National Wildlife Refuge, formerly known as the Arctic National Wildlife Range (Range). Both parties have filed exceptions to the Special Master's Report.

Held:

1. Alaska's exception to the recommended ruling that the State's submerged lands in the vicinity of barrier islands along its Arctic Coast should be measured as a 3-mile belt from a coastline following the normal baseline under the Convention on the Territorial Sea and the Contiguous Zone (Convention) is overruled. The coastline from which a State measures its Submerged Lands Act grant corresponds to the baseline from which the United States measures its territorial sea under the Convention. According to the Convention's normal baseline approach, each island has its own belt of territorial sea, measured outward from a baseline corresponding to the low-water line along the island's coast. Alaska objects to the application of this approach to the Stefans-

son Sound—where some offshore islands are more than six miles apart or more than six miles from the mainland—because it gives the United States "enclaves" of submerged lands, wholly or partly surrounded by state-owned submerged lands, beneath waters more than three miles from the mainland but not within three miles of an island. *United States* v. *Louisiana*, 470 U. S. 93, does not foreclose the conclusion that the Convention's normal baseline principles apply here. Alaska has not identified a firm and continuing United States rule treating waters between the mainland and fringing islands as "inland waters" when the openings between the off-lying islands are no more than 10 miles wide. The sources before the Master showed that, in its foreign relations, particularly in the period 1930 to 1949, the United States had advocated a rule under which objectionable pockets of high seas between the mainland and fringing islands would be assimilated to a coastal nation's territorial sea. Such a rule would have been inconsistent with Alaska's 10-mile rule, under which no objectionable pockets of high seas would have existed. The United States also advocated a rule for treating the waters of a strait leading to an inland sea as inland waters, but it is not equivalent to Alaska's rule. Pp. 7–22.

2. Alaska's exception to the recommended ruling that a gravel and ice formation known as Dinkum Sands is not an island constituting part of Alaska's coastline under the Submerged Lands Act is overruled. The Master did not err in concluding that Dinkum Sands does not meet the standard for an island because it is frequently below mean high water. The Convention's drafting history suggests that, to qualify as an island, a feature must be above high water except in abnormal circumstances. It does not support the broader conclusion that a feature with a seasonal loss in elevation that brings it below mean high water, such as Dinkum Sands, qualifies. Nor is there any precedent for deeming Dinkum Sands an island during the periods when it is above mean high water. Pp. 22–32.

3. Alaska's exception to the recommended ruling that submerged lands beneath tidally influenced waters within the Reserve's boundary did not pass to Alaska at statehood is overruled. The United States can reserve submerged lands under federal control for an appropriate public purpose. Under the strict standards of *Utah Div. of State Lands* v. *United States*, 482 U. S. 193, the 1923 Executive Order creating the Reserve reflected a clear intent to include submerged lands within the Reserve. In addition to the fact that the Order refers to coastal features and necessarily covers the tidelands, excluding submerged lands beneath the coastal features would have been inconsistent with the Reserve's purpose—to secure an oil supply that would necessarily exist

beneath both submerged lands and uplands. Section 11(b) of the Alaska Statehood Act, which noted that the United States owned the Reserve and included a statement of exclusive legislative jurisdiction under the Enclave Clause, reflects Congress' intent to ratify the inclusion of submerged lands within the Reserve and to defeat the State's title to those lands. Pp. 32–46.

4. The United States' exception to the recommended ruling that offshore submerged lands within the Range's boundaries passed to Alaska at statehood is sustained. The United States did not transfer such lands to Alaska at statehood. The 1957 Bureau of Sport Fisheries and Wildlife application to create a wildlife refuge clearly encompassed submerged lands. Since its seaward boundary is the low-water line along Alaska's coast, the Range necessarily encompasses the tidelands. The justification statement accompanying the application, which describes the habitat of various species along the coast and beneath inland waters, further reflects a clear intent to withhold submerged lands. A Department of the Interior regulation in effect when the application was filed and when Congress passed the Alaska Statehood Act operated to "segregate" the lands for which the application was pending. Section 6(e) of that Act expressly prevented lands that had been "set apart as [a] refug[e]" from passing to Alaska. It follows that, because all of the lands covered by the 1957 application had been so "set apart," the United States retained title to submerged lands within the Range. Pp. 46–61.

Exceptions of Alaska overruled; exception of United States sustained; Special Master's recommendations adopted to the extent consistent with the Court's opinion.

O'CONNOR, J., delivered the opinion of the Court, in which STEVENS, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined, and in Parts I, II, and III of which REHNQUIST, C. J., and SCALIA and THOMAS, JJ., joined. THOMAS, J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST, C. J., and SCALIA, J., joined, *post*, p. 62.

Jeffrey P. Minear argued the cause for the United States. With him on the briefs were *Acting Solicitor General Dellinger, Assistant Attorney General Schiffer, Deputy Solicitor General Kneedler,* and *Michael W. Reed.*

G. Thomas Koester argued the cause for defendant. With him on the briefs were *Bruce M. Botelho,* Attorney General of Alaska, *Joanne M. Grace,* Assistant Attorney General, and *John Briscoe.**

JUSTICE O'CONNOR delivered the opinion of the Court.

This original action presents a dispute between the United States and the State of Alaska over the ownership of submerged lands along Alaska's Arctic Coast. In 1979, with leave of the Court, 442 U. S. 937, the United States filed a bill of complaint setting out a dispute over the right to offer lands in the Beaufort Sea for mineral leasing. Alaska counterclaimed, seeking a decree quieting its title to coastal submerged lands within two federal reservations, the National Petroleum Reserve-Alaska and the Arctic National Wildlife Range (now the Arctic National Wildlife Refuge). The Court appointed a Special Master. 444 U. S. 1065 (1980). Between 1980 and 1986, the Special Master oversaw extensive hearings and briefing. Before us now are the report of the Special Master and the exceptions of the parties. We overrule Alaska's exceptions and sustain that of the United States.

I

Alaska and the United States dispute ownership of lands underlying tidal waters off Alaska's North Slope. The region is rich in oil, and each sovereign seeks the right to grant leases for offshore exploration and to share in oil and gas revenues from the contested lands.

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*Briefs of *amici curiae* were filed for the State of Alabama et al. by *Daniel E. Lungren,* Attorney General of California, *Roderick E. Walston,* Chief Assistant Attorney General, and *Jan S. Stevens,* Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Jeff Sessions* of Alabama, *Grant Woods* of Arizona, *Jane Brady* of Delaware, *Margery S. Bronster* of Hawaii, *Alan G. Lance* of Idaho, *Richard P. Ieyoub* of Louisiana, *Mike Moore* of Mississippi, *Joseph P. Mazurek* of Montana, *Frankie Sue Del Papa* of Nevada, *Michael F. Easley* of North Carolina, *Heidi Heitkamp* of North Dakota, *Jan Graham* of Utah, *Jeffrey L. Amestoy* of Vermont, *James S. Gilmore III* of Virginia, and *Julio A. Brady* of the Virgin Islands; and for the Wilderness Society et al. by *Peter Van Tuyn, Eric Jorgensen,* and *James B. Dougherty.*

Several general principles govern our analysis of the parties' claims. Ownership of submerged lands—which carries with it the power to control navigation, fishing, and other public uses of water—is an essential attribute of sovereignty. *Utah Div. of State Lands* v. *United States,* 482 U. S. 193, 195 (1987). Under the doctrine of *Lessee of Pollard* v. *Hagan,* 3 How. 212, 228–229 (1845), new States are admitted to the Union on an "equal footing" with the original 13 Colonies and succeed to the United States' title to the beds of navigable waters within their boundaries. Although the United States has the power to divest a future State of its equal footing title to submerged lands, we do not "lightly infer" such action. *Utah Div. of State Lands, supra,* at 197.

In *United States* v. *California,* 332 U. S. 19 (1947) *(California I),* we distinguished between submerged lands located shoreward of the low-water line along the State's coast and submerged lands located seaward of that line. Only lands shoreward of the low-water line—that is, the periodically submerged tidelands and inland navigable waters—pass to a State under the equal footing doctrine. The original 13 Colonies had no right to lands seaward of the coastline, and newly created States therefore cannot claim them on an equal footing rationale. *Id.,* at 30–33. Accordingly, the United States has paramount sovereign rights in submerged lands seaward of the low-water line. *Id.,* at 33–36. In 1953, following the *California I* decision, Congress enacted the Submerged Lands Act, 67 Stat. 29, 43 U. S. C. § 1301 *et seq.* That Act "confirmed" and "established" States' title to and interest in "lands beneath navigable waters within the boundaries of the respective States." § 1311(a). The Act defines "lands beneath navigable waters" to include both lands that would ordinarily pass to a State under the equal footing doctrine and lands over which the United States has paramount sovereign rights, beneath a 3-mile belt of the territorial sea. § 1301(a). The Act essentially confirms States' equal footing rights to tidelands and submerged lands beneath inland navigable waters; it also establishes States' title to submerged lands beneath a 3-mile belt of the territorial sea, which would otherwise be held by the United States. *California ex rel. State Lands Comm'n* v. *United States,* 457 U. S. 273, 283 (1982). The Alaska Statehood Act expressly provides that the Submerged Lands Act applies to Alaska. Pub. L. 85–508, § 6(m), 72 Stat. 343 (1958). As a general matter, then, Alaska is entitled under both the equal footing doctrine and the Submerged Lands Act to submerged lands beneath tidal and inland navigable waters, and under the Submerged Lands Act alone to submerged lands extending three miles seaward of its coastline.

In hearings before the Special Master, the parties identified 15 specific issues for resolution, which we treat in three groups. First, the parties disputed the legal principles governing Alaska's ownership of submerged lands near certain barrier islands along the Arctic Coast. Second, the parties contested the proper legal characterization of particular coastal features, including a gravel and ice formation in the Flaxman Island chain known as Dinkum Sands. Third, the parties disputed whether, when Alaska became a State, the United States retained ownership of certain submerged lands located within two federal reservations, the National Petroleum Reserve-Alaska in the northwest and the Arctic National Wildlife Refuge in the northeast. For each reservation, the Master considered both whether the seaward boundary encompassed certain disputed waters and whether particular executive and congressional actions prevented the lands beneath tidally influenced waters from passing to Alaska at statehood.

Alaska excepts to three of the Master's recommendations. First, it claims that the Master erred in concluding that waters between the Alaskan mainland and certain barrier islands were not "inland waters," the limits of which would form a portion of the State's coastline for purposes of measuring the State's 3-mile Submerged Lands Act grant. Alaska argues that, at the time of its statehood, the United States had a clear policy of enclosing waters behind near-fringing islands as "inland waters." In abandoning that policy in 1971, Alaska argues, the Federal Government impermissibly "contracted" Alaska's recognized territory. Second, the State challenges the Master's conclusion that Dinkum Sands is not an "island." Under the Master's approach, the low-water line on Dinkum Sands is not part of Alaska's coastline, and the State cannot claim ownership of submerged lands, covering an area of 28 square miles, surrounding the feature. Alaska argues that the Master erred in construing the relevant definition of an "island" and in applying that definition to Dinkum Sands. Third, the State claims that the Master erred in determining that the United States retained ownership of certain submerged lands within the boundaries of the National Petroleum Reserve at Alaska's statehood. Alaska argues both that the Executive lacked authority to prevent submerged lands from passing to Alaska, and that any attempt to include submerged lands within the Reserve was not sufficiently clear to defeat Alaska's title under the equal footing doctrine or under the Submerged Lands Act.

The United States excepts to the Master's recommendation concerning the Arctic National Wildlife Refuge. The Master concluded, among other things, that an administrative application for the Refuge was insufficient to "set apart" submerged lands within the proposed boundaries. As a result, the Master concluded, submerged lands within the Refuge passed to Alaska at statehood.

We consider these exceptions in turn.

II

By applying the Submerged Lands Act to Alaska through the Alaska Statehood Act, see Pub. L. 85–508, § 6(m), 72 Stat.

343 (1958), Congress granted the State title to submerged lands beneath a 3-mile belt of the territorial sea, measured from the State's "coast line." 43 U. S. C. §§ 1301(a)(2), 1311(a). The Act defines the term "coast line" as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." § 1301(c). Alaska's first exception requires us to consider how the presence of barrier islands along its northern shore affects the delimitation of its coastline. The issue is of primary relevance in the Beaufort Sea, between the National Petroleum Reserve-Alaska and the Arctic National Wildlife Refuge. A joint federal-state sale of mineral leases covering this so-called Leased Area, conducted in December 1979, yielded large sums now held in escrow awaiting the outcome of this suit.

In cases in which the Submerged Lands Act does not expressly address questions that might arise in locating a coastline, we have relied on the definitions and principles of the Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, [1964] 15 U. S. T. 1606 (Convention). See *United States* v. *California*, 381 U. S. 139, 165 (1965) *(California II).* Specifically, the coastline from which a State measures its Submerged Lands Act grant corresponds to the "baseline" from which the United States measures its territorial sea under the Convention. The Government argued before the Special Master that the United States measures its territorial sea from a "normal baseline"—the low-water line along the coast, Art. 3, supplemented by closing lines drawn across bays and mouths of rivers, see Arts. 7, 13. Under Article 10(2) of the Convention, each island has its own belt of territorial sea, measured outward from a baseline corresponding to the low-water line along the island's coast.

Although the United States now claims a territorial sea belt of 12 nautical miles, see Presidential Proclamation No. 5928, 3 CFR 547 (1988 Comp.), note following 43 U. S. C.

§ 1331, we are concerned in this case only with the 3-mile belt of the territorial sea that determines a State's Submerged Lands Act grant. Under Article 6 of the Convention, the outer limit of that territorial sea belt is a line every point of which is three miles from the nearest point of the baseline. This means of measuring the outer limit of the belt is also known as the "arcs-of-circles" method.

Alaska objected to application of the Article 3 "normal baseline" approach to its Arctic Coast. In the Leased Area of the Beaufort Sea, some offshore islands are more than six miles apart or more than six miles from the mainland. If Alaska owns only those offshore submerged lands beneath each 3-mile belt of territorial sea, the United States will own "enclaves" of submerged lands, wholly or partly surrounded by state-owned submerged lands, beneath waters more than three miles from the mainland but not within three miles of an island. Two such federal enclaves exist in the Leased Area between the mainland and the Flaxman Island chain, beneath the waters of Stefansson Sound. To eliminate these enclaves, Alaska offered alternative theories for determining the seaward limit of its submerged lands in the vicinity of barrier islands. Alaska principally contended that the United States should be required to draw "straight baselines" connecting the barrier islands and to measure the territorial sea from those baselines. Article 4 of the Convention permits a nation to use straight baselines to measure its territorial sea "[i]n localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity." The parties agree that Alaska's coastline satisfies this description. Under this approach, waters landward of the baseline would be treated as "inland" waters, and Alaska would own all submerged lands beneath those waters.

The Master rejected this approach, finding that the use of straight baselines under Article 4 is permissive, not mandatory, and that the decision whether to use straight baselines is normally one for the Federal Government. Report of the Special Master 45 (hereinafter Report). The United States has never opted to draw straight baselines under Article 4. See *California II, supra,* at 167–169; *United States* v. *Louisiana,* 394 U. S. 11, 72–73 (1969) *(Louisiana Boundary Case); United States* v. *Louisiana,* 470 U. S. 93, 99 (1985) *(Alabama and Mississippi Boundary Case); United States* v. *Maine,* 475 U. S. 89, 94, n. 9 (1986) *(Massachusetts Boundary Case).* As a variant of its straight baselines argument, Alaska claimed that the United States has historically treated waters between the mainland and fringing islands as "inland waters," so long as the openings between the off-lying islands are no more than 10 miles wide. Alaska did not argue that the United States had ever specifically asserted, in its dealings with foreign nations, that the waters of Stefansson Sound are inland waters. Rather, Alaska attempted to identify a general but consistent "10-mile rule" invoked by the United States in its domestic and international affairs. If applied to Alaska's Arctic Coast, the State argued, this rule would require treating the waters of Stefansson Sound as inland waters.

The Master examined the boundary delimitation practices of the United States and concluded that the United States did not have a well-established rule for treating waters between the mainland and fringing islands as inland waters. The Master recognized that, in the *Alabama and Mississippi Boundary Case,* we suggested that between 1903 and 1961 the United States had "enclos[ed] as inland waters those areas between the mainland and off-lying islands that were so closely grouped that no entrance exceeded 10 geographical miles." 470 U. S., at 106–107. Observing that this statement was not "strictly necessary" to the decision in the *Alabama and Mississippi Boundary Case,* the Master declined to rely on it here. The Master therefore concluded that, for purposes of measuring Alaska's submerged lands, the State's coastline should correspond to a normal baseline under Article 3 of the Convention.

For the reasons discussed below, we find no error in the Master's approach.

A

Under the Convention, a nation's past boundary delimitation practice is relevant in a narrow context: specifically, when a nation claims that certain waters are "historic" inland waters under Article 7(6) of the Convention. If certain geographic criteria are met, Article 7(4) of the Convention permits a nation to draw a "closing line" across the mouth of a bay and to measure its territorial sea outward from that line. Waters enclosed by the line are considered internal waters. Article 7(6) also permits a nation to enclose "historic" bays, even if those waters do not satisfy the geographic criteria of Article 7(4). For a body of water to qualify as a historic bay, the coastal nation "must have effectively exercised sovereignty over the area continuously during a time sufficient to create a usage and have done so under the general toleration" of the community of nations. *Id.*, at 102 (citing Juridical Regime of Historic Waters, Including Historic Bays 56, U. N. Doc. A/CN.4/143 (1962)) (internal quotation marks omitted). Accordingly, where a State within the United States wishes to claim submerged lands based on an area's status as historic inland waters, the State must demonstrate that the United States: (1) exercises authority over the area; (2) has done so continuously; and (3) has done so with the acquiescence of foreign nations. See *Alabama and Mississippi Boundary Case, supra,* at 101–102.

Recognizing these strict evidentiary requirements, Alaska does not contend that the waters of Stefansson Sound are historic inland waters. Alaska does not purport to show any *specific* assertion by the United States that the waters of Stefansson Sound are inland waters. Rather, Alaska argues that, at the time it was admitted to the Union, the United States had a general, publicly stated policy of enclosing as inland waters areas between the mainland and closely grouped fringing islands. If this general formula is applied to the Alaska's Arctic Coast, the State argues, the waters of Stefansson Sound qualify as inland waters. Alaska maintains that this policy was in effect from the early 1900's to 1971, when the United States published a set of charts strictly applying the arcs-of-circles method to Stefansson Sound. In Alaska's view, relying solely on the Convention's normal baseline approach to delimit the State's submerged lands impermissibly contracts the State's recognized territory from that which existed at the time of statehood.

Since adopting the Convention's definitions to give content to the Submerged Lands Act, we have never sustained a State's claim to submerged lands based solely on an assertion that the United States had adhered to a certain general boundary delimitation practice at the time of statehood. In the *Louisiana Boundary Case,* we left open the possibility that Louisiana could claim ownership of certain submerged lands by demonstrating a "firm and continuing international policy" of enclosing waters between the mainland and island fringes as "inland waters." 394 U. S., at 74, n. 97. Had that been the United States' "consistent official international stance," the Government "arguably could not abandon that stance solely to gain advantage in a lawsuit to the detriment of Louisiana." *Ibid.* In that litigation, the State ultimately failed to demonstrate any firm and continuing international policy of enclosing waters behind island fringes as inland waters. See *United States* v. *Louisiana,* 420 U. S. 529, 529–530 (1975) *(per curiam)* (decree) (accepting Master's recommendation that certain actions by the United States did not establish a general policy of applying straight baselines to near-fringing islands); Report of Special Master in *United States* v. *Louisiana,* O. T. 1974, No. 9 Orig., pp. 7–13. Alaska nevertheless claims that in the *Alabama and Mississippi Boundary Case* the Court identified a "firm and continuing" 10-mile rule for fringing islands. Alaska first contends that the *Alabama and Mississippi Boundary Case* precludes the Government from claiming that the waters of Stefansson Sound are not inland waters. The State then argues in the alternative that independent evidence supports its formulation of the rule. We address Alaska's points in turn.

B

In the *Alabama and Mississippi Boundary Case,* the Court considered the States' claim that the waters of Mississippi Sound constituted "historic" inland waters under Article 7(6) of the Convention. In discussing whether the States had shown that the United States had continuously asserted the inland water status of Mississippi Sound, the Court identified a general policy "of enclosing as inland waters those areas between the mainland and off-lying islands that were so closely grouped that no entrance exceeded 10 geographical miles." 470 U. S., at 106.

Alaska argues that the Government is estopped from questioning application of this general coastline delimitation practice to its Arctic Coast. Alaska recognizes the rule that the doctrine of nonmutual collateral estoppel is generally unavailable in litigation against the United States, see *United States* v. *Mendoza,* 464 U. S. 154, 160–163 (1984), but suggests that the policy considerations underlying this rule do not apply to cases arising under the Court's original jurisdiction, where the Court acts as factfinder and the United States has an incentive to fully litigate all essential issues.

We have not had occasion to consider application of nonmutual collateral estoppel in an original jurisdiction case, and we see no reason to develop an exception to *Mendoza* here. Even if the doctrine applied against the Government in an original jurisdiction case, it could only preclude relitigation of issues of fact or law *necessary* to a court's judgment. *Montana* v. *United States,* 440 U. S. 147, 153 (1979); *Mendoza, supra,* at 158. A careful reading of the *Alabama and Mississippi Boundary Case* makes clear that the Court did not attach controlling legal significance to any general delimitation formula.

The Master in that case recited a series of statements and precedents following Mississippi's admission to the Union supporting the view that the Federal Government had treated the waters of Mississippi Sound as inland waters. These statements included multiple references to a rule for closing gulfs, bays, and estuaries with mouths less than 10 miles wide as inland waters, Report of Special Master in *Alabama and Mississippi Boundary Case,* O. T. 1983, No. 9 Orig., pp. 40, 42, 48–49, 52, and to a rule for closing straits leading to inland waters, *id.,* at 42, 49–50. In addition, the Master cited a 1961 letter from the Solicitor General to the Director of the United States Coast and Geodetic Survey concerning coastline delimitation principles for the Gulf of Mexico, proposing to treat "'[w]aters enclosed between the mainland and offlying islands . . . so closely grouped that no entrance exceeds ten miles'" as inland waters. *Id.,* at 52.

In excepting to the Master's conclusion that the waters of Mississippi Sound qualified as historic inland waters, the United States argued that the "generalized . . . formulations" recited by the Master could not support the States' claim, without evidence of *specific* federal claims to inland waters status for Mississippi Sound. Exceptions of United States in *Alabama and Mississippi Boundary Case,* O. T. 1983, No. 9 Orig., pp. 32–33. The Court assumed that the United States' position was correct, but concluded that the States had in fact identified "specific assertions of the status of [Mississippi] Sound as inland waters." 470 U. S., at 107; see *id.,* at 108–110.

In light of the Court's assumption that specific assertions of dominion would be critical to the States' historic title claim, we cannot conclude that any general delimitation policy identified in the *Alabama and Mississippi Boundary Case* is controlling here. The Court's inquiry in the *Alabama and Mississippi Boundary Case* was not whether the

States had demonstrated a "firm and continuing international policy" of enclosing waters between the mainland and island fringes as inland waters, sufficiently well defined to cover the waters of Mississippi Sound. Rather, the inquiry was whether the States had demonstrated that the Sound met the specific requirements for a historic inland waters claim under Article 7(6) of the Convention. In the context of that claim, the variation or imprecision in the United States' general boundary delimitation principles might have been irrelevant because the State could point to specific federal assertions that Mississippi Sound consisted of inland waters. But variation and imprecision in general boundary delimitation principles become relevant where, as here, a State relies solely on such principles for its claim that certain waters were inland waters at statehood. The United States is therefore free to argue that any 10-mile rule is not sufficiently well defined to support Alaska's claim that the waters of Stefansson Sound constitute inland waters.

C

Alaska argues that even if principles of collateral estoppel do not apply, the evidence before the Master established that the United States had a well-defined, "firm and continuing" 10-mile rule that would require treating certain areas along Alaska's Arctic Coast as inland waters. The Master exhaustively cataloged documents and statements reflecting the United States' views and practices on boundary delimitation, both in its international relations and in disputes with various States, between 1903 and 1971. The Master found that "the exact nature of the United States' historic practice is a matter of some intricacy," and concluded that any 10-mile rule was not sufficiently well defined to require treating the waters of Stefansson Sound as inland waters. Report 55. Alaska argues that the Master afforded "undue significance to minor variations in the way the United States expressed its otherwise consistent policy over time, ignoring the principle that minor uncertainties and even contradictions in a nation's practice are legally insignificant." Exceptions of State of Alaska 14 (Alaska Exceptions Brief). The relevant sources do not bear out Alaska's claim.

Of particular importance for our analysis is the position of the United States in its foreign relations between 1930 and 1949. In March 1930, the United States formally proposed certain principles for delimiting inland waters to the League of Nations Conference for the Codification of International Law. See 3 Acts of the Conference for the Codification of International Law, Territorial Waters 195–201 (1930) (Acts of the Conference). As the Geographer of the Department of State later observed, where the mainland and offshore islands are assigned individual 3-mile belts of territorial sea, there will remain "small pockets of the high sea deeply indenting territorial waters." U. S. Exh. 85–223 (Boggs, Delimitation of the Territorial Sea, 24 Am. J. Int'l L. 541, 552 (1930)). Because such pockets would "constitute no useful portion of the high sea from the viewpoint of navigation," *ibid.*, the United States proposed that countries "assimilate" these small enclaves of high seas to the adjacent territorial sea where a single straight line of no more than four nautical miles in length would enclose an enclave, 3 Acts of the Conference 201. At the same Conference, the United States also proposed a rule for straits. Where a strait connected "two seas having the character of high seas," the waters of the strait would be considered territorial waters of the coastal nation, as long as both entrances of the strait were less than six nautical miles wide. *Id.*, at 200. Where a strait was "merely a channel of communication with an inland sea," rules regarding closing of bays would apply. *Id.*, at 201. Under those rules, waters shoreward of closing lines less than 10 nautical miles in length would be treated as "inland" waters. *Id.*, at 198.

The United States' 1930 "assimilation" proposal is inconsistent with Alaska's assertion that, since the early 1900's, the United States had followed a firm and continuing 10-mile rule for fringing islands. If the United States' policy had been to draw a baseline connecting islands no more than 10 miles apart, all waters between that line and the mainland would have been treated as "inland waters." Under the 1930 formula, however, there were "small pockets of the high sea" between that line and the mainland, and those pockets would have been assimilated to territorial waters (that is, waters seaward of the coastline), not to inland waters (that is, waters enclosed by the coastline). Alaska now argues that the 1930 assimilation proposal "was at most one of the legally insignificant uncertainties or contradictions" rather than a change from a firm 10-mile rule. Alaska Exceptions Brief 25 (internal quotation marks omitted). Alaska took a different position before the Special Master, where it argued that the United States "unequivocally embraced the 'assimilation' practice as the official United States position" between 1930 and 1949. Brief for Alaska on Island Fringes 54, 60–61; see Alaska Exh. 85–63 (Memorandum of United States in Response to Request of Special Master in *United States* v. *California*, O. T. 1949, No. 11 Orig., p. 19); Alaska Exh. 85–82 (Aide-Mémoire from the Department of State to the Government of Norway, Sept. 29, 1949, pp. 4–5). Alaska cannot explain why the United States would have pointed to the assimilation formula as its official position between 1930 and 1949 if a 10-mile rule for islands was in effect during that time.

Nor does the United States' proposal on straits demonstrate a policy of connecting near-fringing islands with straight baselines of less than 10 miles. If the mainland and offshore islands form the two coasts of a strait, under the United States' proposal the strait would be treated as territorial waters (not inland waters) if it linked two areas of high seas. The distance between the fringing islands may have some bearing on whether those islands in fact form the coast of a strait, but not on whether the waters they enclose are territorial or inland waters. In other words, under the 1930 proposal, the character of the waters to which a strait leads, not the distance between the islands forming one coast of the strait, determines the character of the strait itself.

Rather than treating the mainland and a line connecting fringing islands as the two coasts of a strait, Alaska appears to view a passageway between two offshore islands, leading to the waters between the islands and the mainland, as a strait. With this geographic configuration in mind, Alaska argues that the proposal to apply a 10-mile bay-closing rule to a strait serving as a "channel of communication with an inland sea" is "fully consistent" with a 10-mile rule. Alaska Exceptions Brief 25. But even under this approach, a rule that straits leading to an inland sea are themselves inland waters is not equivalent to a simple 10-mile rule. Again, under the United States' 1930 proposal, the character of the strait depends on the character of the waters to which it leads. A 10-mile bay-closing rule would apply only if the waters between the strait and the mainland were inland waters under some other principle. Under the simple 10-mile rule that Alaska advocates, the fact that the islands are less than 10 miles apart itself determines that the waters behind the islands are inland waters.

In sum, although Alaska is correct that the United States' position at the League of Nations Conference did not call for strict application of the arcs-of-circles method, *ibid.*, neither the assimilation proposal nor the proposal for straits is fully consistent with a simple rule that islands less than 10 miles apart enclose inland waters.

The discussion above leads to the conclusion that, if the United States had a 10-mile rule at Alaska's statehood, that rule developed after 1949. Even if a rule developed within a decade of Alaska's statehood could be considered a "firm and continuing" one, Alaska has not shown that any such rule would encompass the islands off its Arctic Coast. For the period between 1950 and Alaska's statehood, Alaska focuses principally on the United States' position in a series of disputes with States over ownership of submerged lands in the vicinity of near-fringing islands, rather than on positions taken in its international relations. First, in 1950, the State Department and the Justice Department proposed a boundary between Louisiana's inland and territorial waters for use in the *Louisiana Boundary Case.* That boundary, known as the Chapman Line, followed certain barrier islands along Louisiana's southeast coast, enclosing Chandeleur and Breton Sounds and Calliou Bay as inland waters. According to Alaska, the Chapman Line shows the use of a simple 10-mile rule. Second, in 1951, the Justice Department asked the State Department to outline the United States' approach to demarcating inland and territorial waters, for purposes of submerged lands litigation between the United States and California. A letter from the Acting Secretary of State stated that an island "was to be surrounded by its own belt of territorial waters measured in the same manner as in the case of the mainland." Alaska Exh. 85–94 (Letter from James E. Webb to J. Howard McGrath, Attorney General, Nov. 13, 1951, p. 3). The letter also drew upon the 1930 Hague proposals for straits, noting that the waters of a strait connecting high seas were never inland waters, but that bay-closing rules should apply to a strait serving as "a channel of communication to an inland sea." *Id.*, at 4. Third, in a submission to the Court in 1958, the United States commented that waters behind certain islands in Louisiana, Mississippi, and Alabama were inland waters. Brief for United States in Support of Motion for Judgment on Amended Complaint in *United States* v. *Louisiana*, O. T. 1958, No. 9 Orig., pp. 177, 254, 261.

We agree with the Special Master that the United States did not exclusively employ a simple 10-mile rule in its disputes with the Gulf States and with California. The 1951 State Department letter in the *California* litigation merely echoed the United States' proposal at the Hague Conference concerning straits leading to inland waters. As discussed *supra,* at 18–19, a rule applying 10-mile bay-closing principles to straits leading to inland waters would not always lead to the same result as a simple 10-mile rule. Under the former approach, the critical factor is where the strait leads, not the width of the strait. Alaska does not attempt to show that Stefansson Sound is a strait leading to inland waters.

Nor does the 1950 Chapman Line reflect a "firm and continuing" policy of enclosing waters behind fringing islands as "inland waters." The Chapman Line may be consistent with such a policy, but as the Master noted, no contemporaneous document explains the theory behind the Chapman Line in terms of a simple 10-mile rule. Report 85–88. Indeed, a 1950 draft memorandum from the State Department Geographer to the Justice Department opined that Chandeleur and Breton Sounds should be treated as inland waters not only because they were screened by a chain of islands that were less than 10 miles apart, but also because they were "not extensively traversed by foreign vessels" and because the islands covered "more than half the total arc of the territorial sea." U. S. Exh. 85–400. These criteria go far beyond the simple 10-mile rule, and Alaska does not show how they would apply to Stefansson Sound. Finally, statements in the briefs filed by the United States in litigation with the Gulf States that certain waters behind offshore islands were inland waters do not explicitly rely on a 10-mile rule. Moreover, in our decision in *United States* v. *Louisiana,* 363 U. S. 1, 67, n. 108 (1960), we made clear that we did not take the Government's concession that certain islands off Louisiana's shore enclosed inland waters "to settle the location of the coastline of Louisiana or that of any other State."

These and other documents considered by the Master support his conclusion that Alaska has not identified a firm and continuing 10-mile rule that would clearly require treating the waters of Stefansson Sound as inland waters at the time of Alaska's statehood. Indeed, we note that the result Alaska seeks would be in tension with the outcome of the *Massachusetts Boundary Case,* 475 U. S. 89 (1986), where, a year after deciding the *Alabama and Mississippi Boundary Case,* we concluded that the waters of Nantucket Sound are not inland waters. Following the Court's decision in the *Alabama and Mississippi Boundary Case,* Massachusetts argued that a 10-mile rule would make the waters of Nantucket Sound inland waters. The Master in that case recognized that no entrance between the islands enclosing Nantucket Sound exceeded 10 miles, but nevertheless concluded that Massachusetts had not shown that the waters of Nantucket Sound were inland waters. Report of Special Master in *Massachusetts Boundary Case,* O. T. 1984, No. 35 Orig., pp. 69.2–70. We rejected the Commonwealth's claim to inland waters status for Nantucket Sound, framed in its exception to the Master's recommendation as an "ancient title" claim. *Massachusetts Boundary Case, supra,* at 105. If the case could have been resolved by reference to a simple 10-mile rule for all fringing islands, we need not have entertained such a claim.

D

In sum, we conclude that Alaska's entitlement to submerged lands along its Arctic Coast must be determined by applying the Convention's normal baseline principles. The *Alabama and Mississippi Boundary Case* does not foreclose this conclusion. The sources before the Master showed that, in its foreign relations, particularly in the period 1930 to 1949, the United States had advocated a rule under which objectionable pockets of high seas would be assimilated to a coastal nation's territorial sea. Such a rule would have been inconsistent with the maintenance of a 10-mile rule for fringing islands. The United States also advocated a rule for treating the waters of a strait leading to an inland sea as inland waters, but that rule is not equivalent to Alaska's simple 10-mile rule. Whether the waters of Stefansson Sound would be considered inland waters under the 1930 proposal for straits is unclear.

Accordingly, we overrule Alaska's first exception.

III

Alaska next excepts to the Master's conclusion that a small gravel and ice formation in the Flaxman Island chain, known as Dinkum Sands, is not an island. Whether Dinkum Sands is an island affects Alaska's ownership of offshore submerged lands in the feature's vicinity.

As discussed above, a State's coastline provides the starting point for measuring its 3-mile Submerged Lands Act grant. See 43 U. S. C. §§ 1301(a)(2), 1311(a). Generally, the State's coastline corresponds to a "baseline" from which, under the 1958 Convention, the United States measures its territorial sea for international purposes. *Supra,* at 8. Article 10(1) of the Convention defines an island as "a naturally-formed area of land, surrounded by water, which is above water at high-tide." A line of ordinary low water along the coast of an island can serve as a baseline for measuring the territorial sea. See Arts. 10(2), 3. The Convention also permits a nation to claim a belt of territorial sea around certain features that are not above water at high tide, so long as they are located wholly or partly within the territorial sea belt of the mainland or an island. Arts. 11(1)–(2). Again, for purposes of determining a State's ownership rights under the Submerged Lands Act, we are concerned with a 3-mile belt of the territorial sea. See *supra,* at 8–9. Because Dinkum Sands is not within three miles of the nearest islands or the mainland, it does not meet the requirements of Article 11. Accordingly, Dinkum Sands has its own belt of territorial sea—and Alaska owns submerged lands beneath that belt—only if Dinkum Sands satisfies the requirements of Article 10(1).

The issue here has been narrowed to whether Dinkum Sands is "above water at high-tide." Dinkum Sands has frequently been submerged. Apart from daily shifts in the tide and seasonal shifts in sea level, the feature itself changes height. Report 275, 280–283, 309, n. 66. This phenomenon may be at least in part attributable to what the United States' expert witness termed "ice collapse." Dinkum Sands is formed by layers of ice and gravel mixed with ice. As the summer months approach, ice within Dinkum Sands melts and the feature slumps in elevation. 7 Tr. 986–987, 8 Tr. 1060–1062 (July 23, 1984).

Alaska and the United States agree that "high-tide" under Article 10(1) should be defined as "mean high water," an average measure of high water over a 19-year period. Cf. *United States* v. *California,* 382 U. S. 448, 449–450 (1966) *(per curiam)* (entering decree defining an island as "above the level of mean high water" and defining mean high water as "the average elevation of all the high tides occurring over a period of 18.6 years"); *Borax Consol., Ltd.* v. *Los Angeles,* 296 U. S. 10, 26–27 (1935) (approving definition of "mean high tide line" based on "average height of all the high waters . . . over a considerable period of time," at least 18.6 years). They disagree over how frequently a feature of variable elevation such as Dinkum Sands must be above mean high water to qualify as an island. Based on the drafting history of Article 10, the Master concluded that an island must "generally," "normally," or "usually" be above mean high water. Report 302. Applying this standard, the Master reviewed historical hydrographic and cartographic evidence and the results of a joint monitoring project conducted by the parties in 1981 and 1982. He concluded that Dinkum Sands is frequently below mean high water and therefore is not an island. *Id.,* at 310.

Alaska excepts to this conclusion on three grounds. First, Alaska challenges the legal conclusion that Article 10(1) requires an island to be above mean high water at least "generally," "normally," or "usually." Second, Alaska disputes the Master's factual finding that Dinkum Sands is frequently below mean high water. Finally, Alaska argues that Dinkum Sands should be treated as an island when it is in fact above mean high water. We find no error in the Master's conclusion.

A

In the proceedings before the Master, the United States took the position that an island must be "permanently" above mean high water, Brief for United States on Dinkum Sands 17–29, while Alaska argued that Article 10 permits a feature "to slump on occasion below" mean high water but still qualify as an island, Brief for Alaska on Dinkum Sands 64. The Master essentially rejected the United States' position in favor of a somewhat more lenient standard, under which an island must "generally," "normally," or "usually" be above mean high water. Although Alaska now objects to this standard, Alaska Exceptions Brief 44–45, 51, it sets forth no clear alternative. Alaska's observation that "an island that is occasionally submerged is no less an island," *id.*, at 45, is not inconsistent with the Master's approach.

If Alaska is now implicitly claiming that a feature need appear only episodically above mean high water to qualify as an island, its position is without merit. Because Article 10(1) does not specify how frequently a feature must be above mean high water to qualify as an island, we must look to the Convention's drafting history for guidance. See *Louisiana Boundary Case,* 394 U. S., at 42–47. In urging that the Master's interpretation of Article 10(1) is inconsistent with the development of that provision, Alaska focuses on the fact that earlier drafts specified that an island must be "permanently above high-water mark." Report 297 (citing J. François, Report on the Régime of the Territorial Sea, [1952] 2 Y. B. Int'l L. Comm'n 25, 36, U. N. Doc. A/CN.4/53 (in French; translation from Alaska Exh. 84A–21, p. 41)); see Alaska Exceptions Brief 50. The eventual deletion of the modifier "permanently," in Alaska's view, suggests that Article 10(1) contains no implicit modifier at all, such as "generally," "normally," or "usually."

Alaska's reading of Article 10(1)'s drafting history is selective. In fact, the drafting history supports a standard at least as stringent as that adopted by the Master. The provision was first introduced at the League of Nations Conference for the Codification of International Law, held at The Hague in 1930. A preparatory committee offered the following as a basis for discussion: "In order that an island may have its own territorial waters, it is necessary that it should be permanently above the level of high tide." 2 Conference for the Codification of International Law, Bases of Discussion, Territorial Waters 54 (1929). A subcommittee revised the definition but retained the element of permanence: "An island is an area of land, surrounded by water, which is permanently above high-water mark." 3 Acts of the Conference 219. When the International Law Commission of the United Nations revived the work of the Conference in 1951, a special rapporteur reintroduced the subcommittee's definition. Report 297.

In 1954, the British delegate proposed adding the modifier "in normal circumstances," so that an island's status would not be questioned because it was temporarily submerged at high tide in an "exceptional cas[e]." See Summary Records of the 260th Meeting, [1954] 1 Y. B. Int'l L. Comm'n 92. The Commission adopted that proposal, *id.*, at 94, and in its final report defined an island as "an area of land, surrounded by water, which in normal circumstances is permanently above high-water mark," Report of the International Law Commission to the General Assembly, Art. 10, U. N. Gen. Ass. Off. Rec., 11th Sess., Supp. No. 9, U. N. Doc. A/3159, p. 16 (1956).

In 1957, an internal State Department memorandum evaluating the Commission's work suggested that the words "permanently" and "in normal circumstances" appeared to be inconsistent and could both be omitted, because "current international law does not purport to solve such minor problems" as how to treat formations that would be submerged at unusually high states of high tide. Alaska Exh. 84A–21 (Memorandum from Benjamin H. Read, Islands, Drying Rocks and Drying Shoals, Sept. 1957, p. 11). The United States presented that position at the 1958 United Nations Conference on the Law of the Sea, arguing that "there is no established state practice regarding the effect of subnormal or abnormal or seasonal tidal action on the status of islands." 3 United Nations Conference on the Law of the Sea, Official Records: First Committee (Territorial Sea and Contiguous Zone), Summary Records of Meetings and Annexes, U. N. Doc. A/CONF.13/C1./L.112, p. 242 (1958). The Conference adopted the United States' recommendation, and excised the words "permanently" and "in normal circumstances" from the definition of an island.

As the Master recognized, in including the phrase "in normal circumstances," the Convention's drafters had sought to accommodate abnormal events that would cause temporary inundation of a feature otherwise qualifying as an island. Report 300. The United States' view that the international definition of an island need not address abnormal or seasonal tidal activity ultimately prevailed. But the change from the Commission's draft to the final language of the Convention did not signal an intent to cover features that are only sometimes or occasionally above high tide. In fact, the problem of abnormal or seasonal tidal activity that the 1954 amendment addressed is fully solved by the United States' practice of construing "high tide" to mean "mean high water." Averaging high waters over a 19-year period accounts for periodic variations attributable to astronomic forces; nonperiodic, meteorological variations can be assumed to balance out over this length of time. See 2 A. Shalowitz, Shore and Sea Boundaries 58–59 (1964). Accordingly, even if a feature would be submerged at the highest monthly tides during a particular season or in unusual weather, the feature might still be above "mean high water" and therefore qualify as an island.

What Alaska seeks is insular status not for a feature that is submerged at abnormally high states of tide, but for a feature that rises above and falls below *mean* high water—a tidal datum that has already accounted for the tidal abnormalities about which the drafters of Article 10(1) were concerned. Even if Article 10(1)'s drafting history could support insular status for a feature that slumps below mean high water because of an *abnormal* change in elevation, it does not support insular status for a feature that exhibits a pattern of slumping below mean high water because of *seasonal* changes in elevation. Alaska nevertheless contends that there is support for according island status to features more "ephemera[l]" than Dinkum Sands. See Alaska Exceptions Brief 45–50. The authorities Alaska cites all predate the Convention and are therefore unhelpful in construing Article 10(1). Alaska also relies on an analogy to the "mudlumps" of the Mississippi delta, features whose status under the Convention has never been determined. See Report of Special Master in *United States* v. *Louisiana*, O. T. 1974, No. 9 Orig., p. 4 (filed July 31, 1974) (concluding that Louisiana's Submerged Lands Act grant could be measured from two mudlumps, but not deciding whether the mudlumps were islands under Article 10(1) or low-tide elevations under Article 11(1)); *United States* v. *Louisiana*, 420 U. S. 529 (1975) (overruling exceptions).

In sum, the Convention's drafting history suggests that, to qualify as an island, a feature must be above high water except in abnormal circumstances. Alaska identifies no basis for according insular status to a feature that is frequently below mean high water.

B

In disputing the Master's factual conclusion that Dinkum Sands is "frequently below mean high water," Report 39, Alaska relies on three cartographic sources. First, two nautical charts produced following a 1949–1950 survey of the Beaufort Sea by a United States Coast and Geodetic Survey party depict Dinkum Sands as an island, consistent with a survey note describing a "new gravel bar baring about three feet" at mean high water. Alaska Exh. 84A–203 (U. S. Coast and Geodetic Survey, Descriptive Report to Accompany Hydrographic Survey H–7761, p. 3); see Alaska Exh. 84A–202 (U. S. Coast and Geodetic Survey, Addendum to Descriptive Report to Accompany Hydrographic Survey H–7760, p. 4). Second, in 1971, an ad hoc interagency group known as the Baseline Committee, charged with delimiting the United States' coastline, produced baseline charts treating Dinkum Sands as an island. Third, a 1979 map developed for a joint federal-state oil and gas lease sale in the Prudhoe Bay area assigned ownership of a 3-mile belt of territorial sea around Dinkum Sands to Alaska.

As Alaska appears to acknowledge, see Alaska Exceptions Brief 53, the 1971 baseline chart and the 1979 leasing map were based on the 1949–1950 survey rather than independent observations. In 1956, the United States Coast and Geodetic Survey resumed charting Dinkum Sands as a low-tide elevation, based on observations of a Navy vessel made the prior year. It is undisputed that one of the members of the Baseline Committee persuaded the Committee to treat Dinkum Sands as an island based solely on his personal observation of Dinkum Sands as a member of the 1949–1950 survey party. See Alaska Exh. 84A–207 (Department of State, Memorandum to Members of the Baseline Committee, Minutes of Oct. 10, 1979, Meeting, p. 2) (noting that the Committee "has used Dinkum Sands as a basepoint for determining the breadth of the territorial sea . . . because early surveys showed Dinkum Sands to be above high water and Admiral Nygren had personally observed it above high water"). The 1979 leasing map relied on the 1971 baseline chart in assigning Dinkum Sands its own 3-mile belt of territorial sea.

The question, then, is whether the 1949–1950 survey party's conclusion that Dinkum Sands is three feet above mean high water, taken together with visual observations of Dinkum Sands above water, undermines the Master's factual finding that Dinkum Sands is "frequently below mean high water." Report 309. It does not.

Alaska emphasizes that Dinkum Sands has been observed "many times . . . above water" and only "occasionally . . . submerged." Alaska Exceptions Brief 44. But visual observations of Dinkum Sands are not dispositive; the question is not whether Dinkum Sands is above or below high tide on any given day, but where the feature lies in relation to *mean* high water. To address precisely this problem, the parties jointly commissioned a $2.5 million study to calculate mean high water in the feature's vicinity and to determine the feature's elevation in relation to that datum. First, using a year of tidal readings, the National Ocean Survey computed a mean high-water datum at Dinkum Sands and calculated an error band to account for the fact that the level would ordinarily be based on 19 years of readings. Second, an engineering firm measured Dinkum Sands' highest points in March, June, and August 1981.

Comparing the feature's highest elevation measurements to the mean high-water level, the Master found that Dinkum Sands was not above mean high water at any time it was surveyed. The two highest points of the survey were within the error band for the mean high-water level, but the Master found this fact to be of little weight because the measurements were likely taken from piles of gravel disturbed by the March measurements, rather than from Dinkum Sands' true highest points. Alaska continued to measure Dinkum Sands in relation to mean high water in 1982 and 1983. The feature was found to be above mean high water on a visit in July 1982. By September, the feature had fallen in elevation, possibly by more than a foot, see Report 281–282, placing it below the mean high-water datum.

Between May and July 1983, the feature was observed above water several times, although its elevation in relation to mean high water was not known. Based on two helicopter observations of the feature and estimates of sea level in relation to mean high water, the Master concluded that Dinkum Sands could have been above high water by a matter of inches in September 1983. The Master found that the feature was "consistently" below mean high water in 1981 and below mean high water by September—the end of the open water season—in both 1981 and 1982. *Id.*, at 309. Relying largely on the 1981–1983 data, the Master concluded that Dinkum Sands is not an island.

Alaska makes no mention of the 1981 joint monitoring project. The Master discussed the State's methodological objections to the results at length, see *id.*, at 255–269, and we see no reason to revisit the Master's conclusion that those objections are unpersuasive. Alaska does not explain why the Master should have relied on a single August 1949 measurement of Dinkum Sands' elevation in relation to mean high water rather than on the exhaustive survey expressly designed to determine Dinkum Sands' status under Article 10(1) of the Convention. In contending that Dinkum Sands has been above mean high water except on a "handful of occasions," Alaska recognizes that Dinkum Sands slumps in elevation during the open water season between late July and September. Alaska Exceptions Brief 54. Alaska suggests that natural processes build up Dinkum Sands "just . . . prior to the autumn freeze-up," and that the feature then remains above mean high water for 9 to 10 months of the year. See *ibid.* There is no basis in the record, however, for concluding that Dinkum Sands is above mean high water during the winter months. During the winter, the area is completely covered by pack ice. The sole measurement of the feature's elevation during the winter was that taken in March 1981, and it was then below mean high water. Report 286. But even if the record demonstrated that the feature remained above mean high water until "ice collapse" caused it to slump, that would not compel a ruling in Alaska's favor. Although Article 10(1)'s drafting history may suggest that a feature submerged at abnormally high tides does not lose its insular status, it does not support the broader conclusion that a feature with a *seasonal* loss in elevation, bringing it below mean high water, qualifies as an island. See *supra*, at 27.

In sum, we find no error in the Master's conclusion that Dinkum Sands is frequently below mean high water and therefore does not meet the standard for an island.

C

Alaska finally urges a compromise resolution, under which Dinkum Sands would be deemed an island when above mean high water. Alaska attempts to find support for its position in this Court's recognition in prior cases of the concept of an "ambulatory coast line." Alaska Exceptions Brief 55. In adopting the 1958 Convention to aid interpretation of the Submerged Lands Act, we recognized that the Convention treats a nation's coastline as its modern, ambulatory coastline. See *United States* v. *Louisiana*, 394 U. S. 1, 5 (1969) *(Texas Boundary Case)*; *Louisiana Boundary Case*, 394 U. S., at 32–34. Shifts in a low-water line along the shore, we acknowledged, could lead to a shift in the baseline for measuring a maritime zone for international purposes. In turn, the State's entitlement to submerged lands beneath the territorial sea would change.

An island may very well have its *own* ambulatory coastline. What Alaska seeks here, however, is not an entitlement to submerged lands seaward of a gradually accreting or eroding shore. Rather, Alaska's ownership of submerged lands around Dinkum Sands would appear and disappear periodically, depending upon whether the feature was above or below mean high water. Not only does Article 10(1) of the Convention not support such a reading, but Alaska's position makes a sensible application of other provisions of the Convention impossible. The Convention separately categorizes features that are below mean high water, but above water at low tide. See Art. 11. In addition, under Articles 10(2) and 3, an island's belt of territorial sea is measured from the line of low water. As Dinkum Sands' elevation shifts and the feature slumps toward the mean high-water datum, below the mean high-water datum, and possibly below the low-water datum, the baseline for measuring the surrounding maritime zone would shift and then disappear. Quite apart from the fact that Alaska's proposal would lead to costly and time-consuming monitoring efforts, we agree with the Master that Alaska has identified no precedent for treating as an island a feature that oscillates above and below mean high water.

IV

Alaska's third exception concerns the ownership of submerged lands within the National Petroleum Reserve-Alaska (Reserve), a 23-million acre federal reservation in the northwestern part of the State. The Reserve's seaward boundary runs along the Arctic Ocean from Icy Cape at the west to the mouth of the Colville River at the east. When this litigation began, Alaska and the United States disputed the location of the Reserve's boundary, focusing in particular on whether the boundary followed the sinuosities of the coast or instead cut across certain inlets, bays, and river estuaries. Alaska initially conceded federal ownership of submerged lands within that boundary. In light of this Court's decision in *Montana* v. *United States,* 450 U. S. 544 (1981), and with the consent of the United States, the Special Master granted Alaska relief from its concession, and Alaska claimed ownership of submerged lands beneath certain coastal features within the Reserve's boundaries. Order of Special Master in *United States* v. *Alaska,* O. T. 1983, No. 84 Orig. (Jan. 4, 1984). A separate proceeding concerning ownership of submerged lands beneath inland navigable waters is pending in

Federal District Court, *Alaska* v. *United States*, Nos. A83–343, A84–435, A86–191 (D. Alaska), and has been stayed until resolution of the present case, see Report 347, n. 4.

The parties no longer dispute the location of the Reserve's boundary. Accordingly, we consider only the Master's recommendation concerning the ownership of submerged lands beneath certain coastal features within that boundary. The Master concluded that the United States retained ownership of the submerged lands in question at Alaska's statehood. That conclusion rested principally on three premises: first, that the United States can prevent lands beneath navigable waters from passing to a State upon admission to the Union by reserving those lands in federal ownership (as opposed to conveying them to a third party); second, that Congress had authorized the President to reserve submerged lands with a 1910 statute known as the Pickett Act; and third, that the 1923 Executive Order creating the Reserve reflected a clear intent to reserve all submerged lands within the boundaries of the Reserve and to defeat the State's title to the submerged lands in question. Alaska excepts to the Master's conclusion on several grounds, arguing that the Government did not show a sufficiently clear intent to reserve submerged lands or to defeat state title and that the 1923 Executive Order was promulgated without proper authority. We discuss some background principles and then consider these arguments in turn.

A

The Property Clause, Art. IV, § 3, cl. 2, provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." In *Shively* v. *Bowlby*, 152 U. S. 1, 48 (1894), the Court concluded that this power extended to granting submerged lands to private parties, and thereby defeating a future State's equal footing title, "to carry out . . . public purposes appropriate to the objects for which the United States hold the Territory." We agree with the Special Master that Congress can also reserve submerged lands under federal control for an appropriate public purpose, and thus resolve a question left open in *Utah Div. of State Lands,* 482 U. S., at 201, in the United States' favor.

As drawn by the Master, the boundary of the Reserve encompasses both those lands that would ordinarily pass to Alaska under the equal footing doctrine—that is, tidelands and submerged lands beneath inland navigable waters—and those lands that would pass to Alaska only by virtue of the Submerged Lands Act—that is, lands beneath the 3-mile territorial sea. As a result, the parties dispute the principles governing ownership of the submerged lands.

Under our equal footing cases, "[a] court deciding a question of title to the bed of navigable water must . . . begin with a strong presumption" against defeat of a State's title. *Montana, supra,* at 552; see *Utah Div. of State Lands, supra,* at 197–198. We will not infer an intent to defeat a future State's title to inland submerged lands "unless the intention was definitely declared or otherwise made very plain." *United States* v. *Holt State Bank,* 270 U. S. 49, 55 (1926). The United States argues that the presumption against defeat of state title does not apply to lands passing solely under the Submerged Lands Act—that is, lands beneath the territorial sea—over which the United States has paramount authority: Any grant of such lands is to be " 'construed strictly in favor of the United States.' " United States Opposition Brief 53 (quoting *California ex rel. State Lands Comm'n,* 457 U. S., at 287). The Master agreed with the Government's approach, concluding that the United States can demonstrate that it retained title to submerged lands beneath the territorial sea under a "less demanding standard" than our equal footing cases require. Report 394. Nevertheless, the Master analyzed the withdrawal under the "stricter" standards of *Utah Div. of State Lands* and *Montana,* reasoning that the less demanding test for lands beneath the territorial sea would be relevant only if the United States failed to satisfy the more stringent test. Report 394.

Neither the Submerged Lands Act itself nor our case law supports the United States' approach. The Submerged Lands Act grants States submerged lands beneath a 3-mile belt of the territorial sea. The statute is a grant of federal property, and the scope of that grant must be construed strictly in the United States' favor. But that principle does not permit us to ignore the statute's terms, which provide that a State receives title to submerged lands beneath the territorial sea unless the United States "*expressly* retain[s]" them. 43 U. S. C. § 1313(a) (emphasis added). We cannot resolve "doubts" about whether the United States has withheld state title to submerged lands beneath the territorial sea in the United States' favor, for doing so would require us to find an "express" retention of submerged lands where none exists. The Submerged Lands Act does not call into question cases holding that the United States has paramount sovereign authority over submerged lands beneath the territorial sea. See *California I,* 332 U. S., at 35–36; *United States* v. *Louisiana,* 339 U. S. 699, 704 (1950); *United States* v. *Texas,* 339 U. S. 707, 719 (1950). But Congress has chosen to exercise that authority by presumptively granting those lands to the States, unless the United States has "expressly retained" submerged lands.

Reinforcing this reading of the Act is the fact that the Act's terms reach lands governed by the equal footing doctrine as well as lands beneath the territorial sea. Under the terms of the statute, equal footing lands, like those beneath the territorial sea, pass to a State unless the United States "expressly retained" them. In passing the Act, Congress would have legislated against the backdrop of our early equal footing cases. See *Montana,* 450 U. S., at 552, n. 2. There is no indication that, in formulating the "expressly retained" standard, Congress intended to upset settled doctrine and to impose on the Federal Government a more or less demanding standard than the one reflected in those cases, see, *e. g., Holt State Bank, supra,* at 55 (holding that intent to defeat state title to submerged lands must be "definitely declared or otherwise made very plain"), and carried forward in *Montana* and *Utah Div. of State Lands.* Whether title to submerged lands rests with a State, of course, is ultimately a matter of federal intent. In construing a single federal instrument creating a reserve, we see no reason to apply the phrase "expressly retained" differently depending upon whether the lands in question would pass to a State by virtue of a statutory grant or by virtue of the equal footing doctrine, as confirmed by statute.

Applying *Montana* and *Utah Div. of State Lands,* then, we must ask whether the United States intended to include submerged lands within the Reserve and to defeat Alaska's title to those lands.

B

1

President Harding created the National Petroleum Reserve by Executive Order in 1923. The order described a boundary following the Arctic "coast line," measured along "the ocean side of the sandspits and islands forming the barrier reefs and extending across small lagoons from point to point, where such barrier reefs are not over three miles off shore." Exec. Order No. 3797–A, in Presidential Executive Orders (1980) (microform, reel 6). Because the boundary follows the ocean side of the islands, the Reserve necessarily includes tidelands landward of the islands. The Reserve also contains coastal features, including "small lagoons" (to which the Order explicitly refers) and the mouths of rivers and bays (which the Master concluded were within the Reserve's boundary). Report 381. Alaska argues that the fact that the United States included certain water areas within the exterior boundaries of the Reserve does not necessarily mean that the United States clearly intended to reserve the submerged lands beneath those waters. Alaska Exceptions Brief 62. In support of this proposition, Alaska points primarily to our decisions in *Montana, supra,* at 554, and *Utah Div. of State Lands,* 482 U. S., at 202.

In *Montana,* the United States, as trustee for the Crow Tribe, sought a declaratory judgment that it owned the riverbed of the Big Horn River and had conveyed a beneficial interest in the submerged lands to the Tribe. The river was located inside the boundaries of the Crow Reservation established by treaty in 1868, but the treaty did not expressly refer to the riverbed. 450 U. S., at 548, 554. Applying the "strong presumption against conveyance by the United States" to defeat a State's title, *id.,* at 552, we concluded that the "mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance," *id.,* at 554. Even though creation of an Indian reservation could be an "appropriate public purpose" justifying a conveyance of submerged lands, a conveyance of submerged lands beneath the river would not have been necessary for the Government's purpose, because fishing was not important to the Crow Tribe's way of life. *Id.,* at 556.

In *Utah Div. of State Lands,* the Court found that the United States had not prevented the bed of Utah Lake from passing to Utah at statehood. The Sundry Appropriations Act of 1888, 25 Stat. 505, authorized the United States Geological Survey to select "sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows." *Id.,* at 526. The Survey selected Utah Lake as a reservoir site. 482 U. S., at 199. In 1890, when Congress repealed the 1888 Act, it provided "that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided by [the 1888 Act]." Sundry Appropriations Act of 1890, 26 Stat. 391.

In concluding that the 1888 Act did not reflect a clear intent to include submerged lands within lands reserved for reservoir sites, the Court focused in part on the fact that the Act was motivated by concerns that settlers would claim lands suitable for reservoir sites or other reclamation efforts. 482 U. S., at 198, 203. These concerns of "monopolization and speculation" "had nothing to do with the beds of navigable rivers and lakes." *Id.*, at 203. Moreover, the Government's ability to control and develop navigable waters would not be impaired if the land beneath the navigable waters passed to the State. *Id.*, at 202; see also *Arizona* v. *California*, 373 U. S. 546, 597–598 (1963); *Arizona* v. *California*, 283 U. S. 423, 451–452, 457 (1931). We also considered whether certain references to the bed of Utah Lake in reports by the Geological Survey, coupled with the 1890 Act's requirement that selected sites remain segregated, accomplished a reservation of the lake bed. We concluded that the references to the lake bed in the Survey documents, when placed in proper context, did not indicate that the bed was included within the reservation. *Utah Div. of State Lands, supra,* at 206. Finally, we held that even if the 1888 or 1890 Acts reflected a clear intent to include submerged lands within a reservation, there was no evidence that the United States intended to defeat future States' entitlement to any land reserved. Again, our analysis focused on the fact that the transfer of title to the lake bed would not prevent the Government from developing a reservoir or water reclamation project at the lake. *Id.*, at 208.

Montana and *Utah Div. of State Lands* establish that the fact that navigable waters are within the boundaries of a conveyance or reservation does not in itself mean that submerged lands beneath those waters were conveyed or reserved. But Alaska's reliance on these cases is misplaced for two reasons. First, the Executive Order of 1923 does not merely define a boundary that encloses *a body of navigable water.* Rather, in describing a boundary following the ocean side of offshore islands and reefs, the Order created a Reserve that necessarily embraced certain *submerged lands*—specifically, tidelands shoreward of the barrier islands.[1] Second, *Montana* and *Utah Div. of State Lands* establish that the *purpose* of a conveyance or reservation is a critical factor in determining federal intent. See also *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78, 87–89 (1918) (reservation of "body of lands" in southeastern Alaska for Metlakahtla Indians included adjacent waters and submerged lands, because fishing was necessary for Indians' subsistence). The Executive Order of 1923 sought to retain federal ownership of land containing oil deposits. The Order recited that "there are large seepages of petroleum along the Arctic Coast of Alaska and conditions favorable to the occurrence of valuable petroleum fields on the Arctic Coast," and described the goal of securing a supply of oil for the Navy as "at all times a matter of national concern." Petroleum resources exist in subsurface formations necessarily extending beneath submerged lands and uplands. The purpose of reserving in federal ownership all oil and gas deposits within the Reserve's boundaries would have been undermined if those deposits underlying lagoons and other tidally influenced waters had been excluded. It is simply not plausible that the United States sought to reserve only the upland portions of the area.

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[1] In light of the fact that the Order necessarily encompasses tidelands, the partial dissent's conclusion that the United States owns *no* submerged lands within the Reserve is puzzling. The dissent suggests that the United States retains submerged lands only if the relevant instrument " 'in terms embraces the land under the waters.' " *Post,* at 66 (THOMAS, J., concurring in part and dissenting in part) (quoting *Packer* v. *Bird,* 137 U. S. 661, 672 (1891)). By its terms, the Executive Order of 1923 certainly embraces all tidelands landward of the barrier islands. Accordingly, even if the dissent were correct that a federal intent to retain submerged lands can never be inferred, no inference is required for the conclusion that, at the very least, the United States retained the tidelands within the Reserve.

Alaska also argues that any inclusion of submerged lands within the Reserve was not supported by an appropriate public purpose. Specifically, Alaska claims that only a "public exigency" or "international duty" will support a reservation of submerged lands. In *Shively*, the Court recognized a general congressional policy of granting away land beneath navigable waters only "in case of some international duty or public exigency," 152 U. S., at 50. But that is a congressional policy, not a constitutional obligation. *Utah Div. of State Lands*, 482 U. S., at 197. The only constitutional limitation on a conveyance or reservation of submerged lands is that it serve an appropriate public purpose: The United States has the power to dispose of submerged lands in prestatehood territories "'in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out *other public purposes appropriate to the objects* for which the United States hold the Territory.'" *Id.*, at 196–197 (emphasis added) (quoting *Shively, supra,* at 48). There is no question that, as the Master concluded, the inclusion of submerged lands within the Reserve fulfilled an appropriate public purpose—namely, securing an oil supply for the national defense.

In sum, the 1923 Executive Order creating the Reserve reflects a clear intent to include submerged lands within the Reserve. The boundary by its terms embraces certain coastal features, and the Master interpreted it to embrace others. In light of the purpose of the Reserve, it is simply not plausible that the Order was intended to exclude submerged lands, and thereby to forfeit ownership of valuable petroleum resources beneath those lands. The importance of submerged lands to the United States' goal of securing a supply of oil distinguishes this case from *Montana* and *Utah*

Div. of State Lands, where the disputed submerged lands were unnecessary for achieving the federal objectives.

2

Under *Utah Div. of State Lands*, we must ask not only whether the United States intended a reservation to include submerged lands, but also whether the United States intended to defeat a future State's title to those lands. The Master found that Congress expressed a clear intent to defeat state title in § 11(b) of the Alaska Statehood Act. Pub. L. 85–508, 72 Stat. 347. That section provides that the United States has the "power of exclusive legislation . . . as provided by [the Enclave Clause of the Constitution, Art. I, § 8, cl. 17,] over such tracts or parcels of land as, immediately prior to the admission of said State, are owned by the United States and held for military . . . purposes, including naval petroleum reserve numbered 4 [the National Petroleum Reserve]." The Master concluded that § 11(b), "in referring to the Reserve as 'owned by the United States,' clearly contemplate[d] continued federal ownership of the Reserve." Report 433.

Alaska argues that § 11(b)'s reference to exclusive federal legislative authority over the Reserve under the Enclave Clause says nothing about United States' *title* to submerged lands within the Reserve. Alaska suggests that the United States need not *own* all lands within a military area to exercise jurisdiction, and Congress "had no reason to defeat State title to submerged lands [since] it always retains plenary authority to regulate navigable waters for defense purposes." Alaska Exceptions Brief 64. Alaska thus attempts to align this case with *Utah Div. of State Lands*, where we found no clear intent to defeat state title to the bed of Utah Lake, in part because the United States need not have defeated state title to preserve its ability to develop a reservoir or water reclamation project at the lake. 482 U. S., at 208.

Alaska's argument fails for several reasons. First, Alaska ignores the fact the Reserve was not created to preserve the United States' "authority to regulate navigable waters for defense purposes," but to preserve the Government's ability to extract petroleum resources. Ownership may not be necessary for federal regulation of navigable waters, but it is necessary to prevent the Reserve's petroleum resources from being drained from beneath submerged lands. Second, when the United States exercises its power of "exclusive legislation" under the Enclave Clause, it necessarily acquires title to the property. See *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 141, 142 (1937) ("[The Enclave Clause] governs those cases where the United States *acquires* lands with the consent of the legislature of the State for the purposes there described" (emphasis added)); see also *Collins* v. *Yosemite Park & Curry Co.*, 304 U. S. 518, 527 (1938). Third, Alaska's argument that § 11(b) of the Statehood Act says nothing about federal ownership of the Reserve ignores the fact that, on its face, § 11(b) states that the United States "owned" the Reserve.

As discussed *supra,* at 38–41, the Reserve included submerged lands. Section 11(b) thus reflects a clear congressional statement that the United States owned and would continue to own submerged lands included within the Reserve. The conclusion that Congress was aware when it passed the Alaska Statehood Act that the Reserve encompassed submerged lands is reinforced by other legislation, enacted just before Alaska's admission to the Union, granting certain offshore lands to the Territory of Alaska. See Pub. L. 85–303, § 2(a), 71 Stat. 623. Congress expressly exempted from that grant "all oil and gas deposits located in the *submerged lands* along the Arctic coast of naval petroleum reserve numbered 4 [the National Petroleum Reserve]." § 3(d) (emphasis added). Moreover, in contrast to *Utah Div. of State Lands,* defeating state title to submerged lands was necessary to achieve the United States' objective—securing a supply of oil and gas that would necessarily exist beneath uplands and submerged lands. The transfer of submerged lands at statehood—and the loss of ownership rights to the oil deposits beneath those lands—would have thwarted that purpose.

C

Alaska argues that even if the 1923 Executive Order purported to include submerged lands within the Reserve for an appropriate public purpose and even if § 11(b) reflects a clear intent to defeat state title to all lands within the Reserve, title still passed to Alaska because the President lacked the authority to include submerged lands within the Reserve. Alaska Exceptions Brief 58–60. The argument is based in part on *Utah Div. of State Lands,* where we referred to the authority of *Congress* to dispose of property under the Property Clause, Art. IV, § 3, cl. 2. Since *Utah Div. of State Lands* concerned congressional enactments, it discloses little about the circumstances under which action by the Executive will defeat a State's equal footing claim to submerged lands.

As authority for inclusion of submerged lands within the Reserve, the Master focused on the Act of June 25, 1910, ch. 421, 36 Stat. 847, also known as the Pickett Act. The Act stated:

> "[T]he President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress." § 1, 36 Stat. 847 (repealed by the Federal Land Policy and Management Act of 1976, Pub. L. 94–579, § 704(a), 90 Stat. 2792).

The Pickett Act nowhere specifically mentions submerged lands, and Alaska therefore challenges the Master's conclusion that the Pickett Act gave the President the express authority to dispose of them. Its argument rests mainly on the proposition that the Pickett Act's reference to "withdraw[al]" of "public lands" cannot include submerged lands, because such lands are not subject to sale, settlement, or entry under the general land laws and therefore need not be "withdrawn." Cf. *Utah Div. of State Lands,* 482 U. S., at 203 (1888 Act stated that lands designated for reservoir sites were "'reserved from sale as the property of the United States, and shall not be subject . . . to entry, settlement or occupation'"; rejecting claim that Act authorized inclusion of submerged lands in part because such lands were already exempt from sale, entry, or occupation); *Mann* v. *Tacoma Land Co.,* 153 U. S. 273, 284 (1894) ("[T]he general legislation of Congress in respect to public lands does not extend to tide lands"); *Shively,* 152 U. S., at 48 ("Congress has never undertaken by general laws to dispose of" land under navigable waters).

Assuming, *arguendo,* that Alaska's construction of the Pickett Act is correct, it does not control the outcome of this case. We conclude that Congress ratified the terms of the 1923 Executive Order in § 11(b) of the Statehood Act. Despite Alaska's protestations to the contrary, there would have been no barrier to Congress retaining a petroleum reserve, including submerged lands, at the point of Alaska's statehood, provided it satisfied *Utah Div. of State Lands'* requirements of demonstrating a clear intent to include submerged lands within the Reserve's scope and a clear intent to defeat Alaska's title. It follows that Congress could achieve the same result by explicitly recognizing, at the point of Alaska's statehood, an Executive reservation that clearly included submerged lands. Cf. *Utah Div. of State Lands, supra,* at 205–207 (examining United States' claim that references to the bed of Utah Lake made by the Geological

Survey in reserving Utah Lake, taken together with 1890 Act providing that reservoir sites selected by the Geological Survey "shall remain segregated and reserved from entry or settlement," signaled Congress' ratification of the reservation of the lake bed; rejecting claim on the ground that Congress was not on notice that the Geological Survey had reserved the bed of the lake); *Holden* v. *Joy*, 17 Wall. 211, 247 (1872) (rejecting Property Clause challenge to President's treaty with Cherokee Nation; although terms of treaty exceeded express delegation of authority by Congress to the President, Congress had "repeatedly recognized" the validity of the treaty by enacting appropriation statutes). As discussed *supra*, at 38–41, the 1923 Executive Order reflected a clear intent to include submerged lands within the Reserve. That instrument placed Congress on notice that the President had construed his reservation authority to extend to submerged lands and had exercised that authority to set aside uplands and submerged lands in the Reserve to secure a source of oil for the Navy. Congress acknowledged the United States' ownership of and jurisdiction over the Reserve in § 11(b) of the Statehood Act. Accordingly, Congress ratified the inclusion of submerged lands within the Reserve, whether or not it had intended the President's reservation authority under the Pickett Act to extend to such lands.

D

In sum, we conclude that the United States retained ownership of submerged lands beneath certain coastal features within the Reserve at Alaska's statehood. Under the strict standards of *Utah Div. of State Lands*, the Executive Order of 1923 reflected a clear intent to include submerged lands within the Reserve. In addition to the fact that the Order refers to coastal features and necessarily covers the tidelands, excluding submerged lands beneath the coastal features would have been inconsistent with the purpose of the Reserve—to secure a supply of oil that would necessarily exist beneath both submerged lands and uplands. Section 11(b) of the Alaska Statehood Act, which noted that the United States owned the Reserve and which included a statement of exclusive legislative jurisdiction under the Enclave Clause, reflects Congress' intent to ratify the inclusion of submerged lands within the Reserve and to defeat the State's title to those lands.

V

The United States excepts to the Master's conclusion that submerged lands within a federal reservation in northeastern Alaska, now known as the Arctic National Wildlife Refuge, passed to Alaska upon its admission to the Union in 1959. In November 1957, the Department of the Interior's Bureau of Sport Fisheries and Wildlife submitted an application to the Secretary of the Interior for withdrawal of 8.9 million acres of land "to establish an Arctic Wildlife Range within all or such portion of the described lands as may be finally determined to be necessary for the preservation of the wildlife and wilderness resources of that region of northeastern Alaska." Alaska Exh. 81 (Application for Withdrawal by Public Land Order, p. 1). This application was still pending in July 1958, when Congress passed the Alaska Statehood Act, and in January 1959, when Alaska was formally admitted to the Union. On December 6, 1960, the Secretary of the Interior issued Public Land Order 2214, which "reserved" the area "for use of the United States Fish and Wildlife Service as the Arctic National Wildlife Range." 25 Fed. Reg. 12598. In 1980, Congress expanded the Range to include an additional 9.2 million acres and renamed it the Arctic National Wildlife Refuge. Pub. L. 96–487, § 303(2)(A), 94 Stat. 2390.

Before the Master, the parties disputed whether the 1957 Bureau of Sport Fisheries and Wildlife application for withdrawal and creation of the Range—filed before but granted after Alaska's admission to the Union—could prevent title to submerged lands within the Range from passing to Alaska at statehood. The Alaska Statehood Act transferred to Alaska certain real property used for the conservation and protection of wildlife, but withheld from the State "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife." Pub. L. 85–508, § 6(e), 72 Stat. 341. Among other things, the United States argued that the lands within the Range, including coastal submerged lands, had been "set apart" by the combined effect of the application and a Department of the Interior regulation in force when the application was filed and when Congress passed the Alaska Statehood Act. That regulation provided that the filing of an application "shall temporarily segregate such lands from settlement, location, sale, selection, entry, lease, and other forms of disposal under the public land laws, including the mining and the mineral leasing laws, to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal." 43 CFR § 295.11(a) (Supp. 1958). Accordingly, under the United States' principal theory, the 1957 Bureau of Sport Fisheries and Wildlife application had the legal effect of segregating or "setting apart" all lands within the projected boundaries of the Range, including submerged lands, as a wildlife refuge. If this were so, § 6(e) of the Alaska Statehood Act withheld such lands from Alaska at statehood.

The Special Master rejected this approach. He focused on the fact that § 6(e) prevents transfer only of those lands "set apart *as* refuges or reservations for the protection of wildlife." (Emphasis added.) The Master concluded that, taken together, the 1957 application and the Department of the Interior regulation "caused land to be set apart *for the purpose of* a wildlife reservation," but found that the land "was not yet set apart *as* a refuge or reservation" upon Alaska's admission to the Union, because the application had not yet been granted. Report 464 (first emphasis added). Since the application and regulation did not withhold the lands within the Range from Alaska under § 6(e) of the Alaska

Statehood Act, the Master concluded that coastal submerged lands within the Range passed to Alaska upon its admission to the Union. Because real property used for conservation of wildlife, but not set apart as a wildlife refuge or reservation, would have been transferred to Alaska, the Master's approach arguably calls into question federal ownership of *uplands* as well as submerged lands within the Range. See *infra*, at 60–61.

Alaska had argued in the alternative that, even if the application was effective to prevent submerged lands within the Range from passing to Alaska at statehood, the boundaries of the Range did not embrace certain submerged lands between the mainland and the barrier islands along Alaska's northeastern coast. The Master's recommendation in Alaska's favor on the effect of the application, if accepted, would have made irrelevant the dispute concerning the boundaries of the Range. The Master nevertheless addressed Alaska's alternative argument and resolved the boundary dispute in the United States' favor. Report 478–495. The Master also considered the effect of *Montana* and *Utah Div. of State Lands* on Alaska's ownership of submerged lands within the Range. In supplemental briefing submitted after we decided those cases, Alaska argued that the 1957 application reflected no clear intent to include submerged lands within the Range. Even if the application embraced submerged lands, Alaska asserted, the United States had identified no evidence that Congress intended to defeat Alaska's title to those lands. Relying principally on a statement of justification attached to the 1957 application, the Master found a clear intent to include submerged lands within the Range. That statement of justification described the seacoast as "provid[ing] habitat for polar bears, Arctic foxes, seals, and whales," Alaska Exh. 16 (Memorandum from the Director of the Bureau of Sport Fisheries and Wildlife to the Bureau of Land Management, Nov. 7, 1957, p. 2); the Master reasoned that the drafters of the application "[could] not have thought this habitat was only upland," Report 496. In addition, the Master noted that the original boundary of the Range was the high water mark along the Arctic Coast; the drafters changed the boundary to the extreme low water mark so as to include the tidelands within the Range. *Ibid.* The Master also found that the application reflected an intent to defeat Alaska's title, pointing out that the reservation was "meant to have permanent effect," not merely to hold whatever submerged lands were made part of the Range until Alaska's admission to the Union. *Ibid.*

The United States excepts to the Special Master's conclusion that the 1957 application and the Department of the Interior regulation, read together, did not have the effect of "setting apart" lands within the Range "as [a] refug[e] . . . for the protection of wildlife." Alaska defends the Master's conclusion concerning the legal effect of the application. Alaska also defends on alternative grounds the ultimate conclusion that submerged lands within the Range passed to Alaska, arguing that the United States did not clearly intend to include submerged lands within the Range and that the United States did not clearly intend to defeat Alaska's title to those lands. In essence, Alaska challenges the Master's conclusion that the 1957 application met the requirements of *Montana* and *Utah Div. of State Lands*—a conclusion appearing in a section of the Report to which it did not except. See Report 495–499. As will become clear, however, although the Master considered separately whether the application had the effect of "setting apart" lands within the Range within the meaning of § 6(e) and whether the requirements of *Montana* and *Utah Div. of State Lands* had been met, those inquiries overlap considerably. We therefore must address the application of *Montana* and *Utah Div. of State Lands* to this case.

A

As with the Reserve, the boundaries of the Range, as drawn by the Master, encompass both submerged lands beneath tidelands and inland navigable waters—which would ordinarily pass to Alaska under the equal footing doctrine as confirmed by the Submerged Lands Act—and submerged lands beneath the territorial sea—which would pass to Alaska only by virtue of its Submerged Lands Act grant. As discussed *supra,* at 35–36, Congress has chosen in the Submerged Lands Act to exercise its paramount authority over submerged lands beneath the territorial sea by granting such lands to a coastal State, unless the Federal Government "expressly retained" the lands in question when the State entered the Union. 43 U. S. C. § 1313(a); see § 1301(a). Applying the logic of *Montana* and *Utah Div. of State Lands,* therefore, we ask whether the United States clearly included submerged lands within the Range and intended to defeat state title to such lands. If it did, the United States will have demonstrated that it "expressly retained" the coastal submerged lands at issue in this case, including tidelands and lands beneath the territorial sea.

B

The Master examined the legal effect of the 1957 application in one section of his Report and applied the analysis of *Montana* and *Utah Div. of State Lands* in another. These inquiries overlap significantly, as the Government's argument makes clear. The Government claims that the 1957 Bureau of Sport Fisheries and Wildlife application reflected the United States' clear intent to include submerged lands within the proposed Range, satisfying the first inquiry under *Utah Div. of State Lands.* As for the second inquiry, the Government argues that the United States expressly retained all lands within the Range, including submerged lands, with § 6(e) of the Alaska Statehood Act. That subsection prevented the transfer to Alaska of any lands "set apart" as a refuge. The Government maintains that the legal effect of the 1957 application was to "set apart" the Range as a refuge. If so, the Government argues, § 6(e) reflects a clear congressional intent to defeat state title. We address the terms of the application and the proper interpretation of § 6(e) in turn.

1

It is clear that the 1957 application by the Bureau of Sport Fisheries and Wildlife for withdrawal of lands in northeastern Alaska included submerged lands. The application contained a boundary description beginning from "the line of extreme low water of the Arctic Ocean" at the Canadian border and following "westerly along the said line of extreme low water, including all offshore bars, reefs, and islands" to Brownlow Point. Alaska Exh. 81, p. 3. Because the boundary follows the line of extreme low water, the Range necessarily encompasses the periodically submerged tidelands. The boundary description also expressly refers to certain submerged lands, including offshore "bars" and "reefs." Moreover, a statement of justification accompanying the application illustrates that the Range was intended to include submerged lands beneath other bodies of water. The statement explained that "countless lakes, ponds, and marshes [within the proposed Range] are nesting grounds for large numbers of migratory waterfowl that spend about half of each year in the United States. . . . The river bottoms with their willow thickets furnish habitat for moose. This section of the seacoast provides habitat for polar bears, Arctic foxes, seals, and whales." Alaska Exh. 16, p. 2. As the Master concluded, the drafters of the application would not have thought that the habitats mentioned were only upland. Report 496.

The express reference to bars and reefs and the purpose of the proposed Range each distinguish this case from *Montana* and *Utah Div. of State Lands.* In those cases, we concluded that submerged lands beneath certain bodies of water had not been conveyed or reserved, despite the fact that the bodies of water fell within the boundaries of the conveyance or reservation. Neither case involved an instrument of conveyance or reservation that, properly understood, referred to submerged lands. See *Montana,* 450 U. S., at 548, 554; *Utah Div. of State Lands,* 482 U. S., at 203. Moreover, in each case, we focused on the purpose of the conveyance or reservation as a critical factor in determining federal intent. See *supra,* at 38–40. In *Montana,* we reasoned that a conveyance of a beneficial interest in submerged lands beneath a river on the Crow Reservation would not have been necessary to achieve the Government's purpose in creating the reservation, because fishing was not important to the Crow Tribe's way of life. 450 U. S., at 556. Similarly, in *Utah Div. of State Lands,* we concluded that the Federal Government could prevent settlers from claiming lands adjacent to waters suitable for reservoir sites and could control the development of those waters, even if lands beneath the waters in question passed to the State. 482 U. S., at 202, 208. Here, in contrast, the statement of justification accompanying the 1957 Bureau of Sport Fisheries and Wildlife application demonstrated that waters within the boundaries of the Range were an essential part of the habitats of the species the Range was designed to protect, and that retention of lands underlying those waters was critical to the Government's goal of preserving these aquatic habitats.

Alaska resists the conclusion that the application reflected an intent to include submerged lands within the Range on two grounds. First, Alaska focuses on the fact that the application sought only to withdraw lands within the Range from " 'all forms of appropriation under the public land laws' except mineral leasing and mining locations." Reply Brief for State of Alaska 17 (quoting Alaska Exh. 81, p. 1). Relying on language in *Utah Div. of State Lands,* Alaska argues that submerged lands are not subject to disposal under the public land laws and there would have been no need to exempt them from appropriation under those laws. Alaska Opposition Brief 17; see 482 U. S., at 203 (rejecting claim that 1888 Act authorized inclusion of submerged lands in part because such lands were already exempt from sale, entry, or occupation).

Alaska misreads the application. Although the application did seek to preclude appropriation of lands within the proposed Range under the public land laws (presumably where those laws would otherwise apply), the application had a far broader purpose: to establish a reservation for the use of the Bureau of Sport Fisheries and Wildlife. See Alaska Exh. 81, p. 1 ("The purpose of this withdrawal is to establish an Arctic Wildlife Range within all or such portion of the described lands as may be finally determined to be necessary for the preservation of the wildlife and wilderness resources of that region of northeastern Alaska"). Because the application was not designed solely to prevent appropriation of lands governed by the public land laws, focusing on whether the public land laws reach submerged lands cannot end our inquiry into whether the application embraced submerged lands.

Second, Alaska argues that no "international duty or public exigency" supported the inclusion of submerged lands within the application. As we concluded earlier, however, the United States need only identify an "appropriate public purpose" for conveying or reserving submerged lands. See *supra,* at 40. Creation of a wildlife refuge is an appropriate public purpose that is served by including submerged lands within the refuge. Alaska also appears to suggest that an application alone can *never* reveal an appropriate public purpose, because until the application is granted it cannot be known whether submerged lands are necessary to achieve that purpose. See Reply Brief for State of Alaska 14. If the Secretary of the Interior had granted the withdrawal application before Alaska's statehood—thereby confirming that an appropriate public purpose supported the reservation of submerged lands—Alaska presumably would have no claim that the application had never covered submerged lands in the first place. It follows that Alaska objects not to the notion that the application covered submerged lands, but rather to the proposition that Alaska's title to submerged lands covered by the application could be defeated even though the application was still pending when Alaska was admitted to the Union. We address below whether the United States could have defeated Alaska's title to lands not yet part of a completed reservation. See *infra,* at 59–61.

Finally, it is important to point out what Alaska does *not* argue at this stage of the proceedings. Alaska does not defend the Master's ultimate recommendation on the alternative ground that the Bureau of Sport Fisheries and Wildlife lacked the authority to include submerged lands within an application to set aside lands for a wildlife refuge. In connection with its exception to the Master's recommendation that the United States retained submerged lands within the Reserve, Alaska argued that Congress had not properly delegated to the Executive its authority under the Property Clause, Art. IV, §3, cl. 2, to divest a future State of its title to submerged lands. Alaska makes no parallel argument here. Tr. of Oral Arg. 80–81. In any event, the Government does not claim here that Executive actions alone establish in this case that the United States retained submerged lands within the Range. Rather, the Government relies squarely on congressional intent underlying §6(e) of the Alaska Statehood Act. Our prior discussion of ratification of Executive action applies equally here. See *supra,* at 44–46. There would have been no constitutional impediment to Congress designating a wildlife refuge encompassing submerged lands and retaining title to it upon Alaska's admission to the Union, provided Congress' actions were sufficiently clear to meet the requirements of our submerged lands cases. It follows that Congress could accomplish the same result by recognizing prior Executive actions. We discuss below whether Congress did so here. See *infra,* at 56–61.

In sum, we conclude that the application by the Bureau of Sport Fisheries and Wildlife to withdraw lands for a wildlife refuge reflected a clear intent to reserve submerged lands as well as uplands. The Range's boundary was drawn so that the periodically submerged tidelands were necessarily included within it; the boundary description referred on its face to submerged features such as bars and reefs. Moreover, the purpose of the federal reservation—protecting the habitats of various species found along the coast and in other navigable water bodies within the Range—supported inclusion of submerged lands within the Range.

2

We now consider whether, prior to Alaska's admission to the Union, the United States defeated the future State's title to the submerged lands included within the proposed Range.

The Alaska Statehood Act set forth a general rule that the United States would retain title to all property it held prior to Alaska's admission to the Union, while the State of Alaska would acquire title to all property held by the Territory of Alaska or its subdivisions. Pub. L. 85–508, § 5, 72 Stat. 340. There were several exceptions to that provision. Of primary relevance here is § 6(e), which transferred to Alaska "[a]ll real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska . . . [provided] [t]hat such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife . . . ." *Id.*, at 340–341.

In our view, under § 6(e) of the Alaska Statehood Act, the United States retained the Range as lands "withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife," rather than transferring the lands to Alaska. As discussed above, the 1957 application reflected an intent to include submerged lands within the Range. Shortly after the application was filed, the Secretary of the Interior publicly announced the action. See U. S. Exh. 12 (Department of the Interior Press Release, Nov. 20, 1957); U. S. Exh. 32 (statement of Secretary Seaton). Formal notice of the application was published in the Federal Register in January 1958. 23 Fed. Reg. 364. Moreover, later in 1958, while Congress was considering Alaska's admission to the Union, the Secretary of the Interior informed Congress that the application for the Range was pending and submitted maps showing the area as a federal enclave embracing submerged lands. See U. S. Exh. 61 (Department of Interior, Bureau of Land Management, Alaska: Federal Land Withdrawals and Reservations, July 1958, Section No. 8).[2] By virtue of that submission, Congress was on notice when it passed the Alaska Statehood Act that the Secretary of the Interior had construed his authority to withdraw or reserve lands, delegated by the President, see Exec. Order No. 10355, 3 CFR 873 (1949–1953 Comp.), to reach submerged lands. If the 1957 application in fact had the legal effect of "withdraw[ing] or otherwise set[ting] apart" lands within the proposed Range "as refuges or reservations for the protection of wildlife" within the meaning of § 6(e), then the United States retained title to submerged lands as well as uplands within the Range. This is so despite § 6(m) of the Statehood Act, which applied the Submerged Lands Act of 1953 to Alaska. The Submerged Lands Act operated to confirm Alaska's title to equal footing lands and to transfer title to submerged lands beneath the territorial sea to Alaska at statehood, *unless* the United States clearly withheld submerged lands within either category prior to statehood. In § 6(e) of the Statehood Act, Congress clearly contemplated continued federal ownership of certain submerged lands—both inland submerged lands and submerged lands beneath the territorial sea—so long as those submerged lands were among those "withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife."

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[2] Alaska claims that the map submitted to Congress did not depict the Range, but a 1943 withdrawal under Public Land Order 82, 8 Fed. Reg. 1599, revoked, 25 Fed. Reg. 12599 (1960). Five million acres of the land to be included in the Range were covered by PLO 82, and the Secretary of the Interior announced a modification of the terms of PLO 82 and the filing of the application for the Range at the same time. See U. S. Exh. 12, p. 2; U. S. Exh. 32, p. 2. The importance of the map is not that it precisely depicts the Range's current boundaries, but that it shows the area encompassing the Range as a proposed federal enclave embracing submerged lands.

Under *Montana* and *Utah Div. of State Lands,* an intent to defeat state title to submerged lands must be clear. As this discussion illustrates, the operative provision of the Alaska Statehood Act, § 6(e), reflects a very clear intent to defeat state title. The only remaining question is whether an application by the head of the Bureau of Sport Fisheries and Wildlife, upon which the Secretary of the Interior had not yet acted, had the effect of "withdraw[ing] or otherwise set[ting] apart" lands within the proposed Range "as refuges or reservations for the protection of wildlife" within the meaning of § 6(e).

Under a Department of the Interior regulation first promulgated in 1952, 17 Fed. Reg. 7368, and in effect at the time Congress passed the Statehood Act, an application for a withdrawal temporarily segregated the lands covered by the application. That regulation provided:

> "The noting of the receipt of the application . . . shall temporarily segregate such lands from settlement, location, sale, selection, entry, lease, and other forms of disposal under the public land laws . . . to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal. To that extent, action on all prior applications the allowance of which is discretionary, and on all subsequent applications, respecting such lands will be suspended until final action on the application for withdrawal or reservation has been taken." 43 CFR § 295.11(a) (Supp. 1958).

The regulation temporarily foreclosed any use of the land that a decision by the Secretary of the Interior to grant the application would prevent. It also suspended all pending discretionary applications and all subsequent applications for other uses of the land. This temporary segregation remained in effect unless and until the Secretary of the Interior denied an application. § 295.13(c).

The Special Master adopted the United States' view that the application and the regulation together "set apart" all lands within the Range. Report 464. We agree that this conclusion follows from a straightforward application of § 295.11. Alaska argues that the regulation was not intended to operate on submerged lands. The object of the regulation is quite clear: to prevent, during the pendency of an application, any use of the land that would frustrate federal control if the application were ultimately granted. That goal is implicated wherever a threat to future federal control exists—whether the lands in question are uplands or submerged lands. The State focuses on the fact that the regulation segregates lands from sale, entry, or other forms of disposal, and argues that submerged lands are ordinarily not subject to such forms of disposal. Cf. *Utah Div. of State Lands,* 482 U. S., at 203. But the language in *Utah Div. of State Lands* on which Alaska relies reflects the Court's recognition that under the *general* land laws opening up lands for settlement, private parties ordinarily cannot lay claims to submerged lands. In Alaska, however, *specific* laws had opened up certain submerged lands for mining well prior to the filing of the application for the Range. See, *e. g.,* Act of June 6, 1900, § 26, 31 Stat. 329–330 (providing that "land and shoal water between low and mean high tide on the shores, bays, and inlets of Bering Sea . . . shall be subject to exploration and mining for gold and other precious metals"); Act of May 31, 1938, ch. 297, 52 Stat. 588 (extending provisions beyond the Bering Sea to "the shores, bays, and inlets of Alaska"); Act of Aug. 8, 1947, 61 Stat. 916 (extending provisions to lands beneath nontidal navigable waters). In light of these provisions, Alaska's premise—that there would have been no need to withdraw or set apart submerged lands to preserve ultimate federal control—is flawed.

Although the Master concluded that the application and regulation together "set apart" all lands within the Range, the Master accepted Alaska's argument that the lands had not been set apart "*as* [a] refug[e] . . . for the protection of wildlife" within the meaning of § 6(e) of the Alaska Statehood Act. (Emphasis added.) The Master found that the application "did not have the same effect as a reservation of lands, dedicating them to a specific public purpose." Report 464. The Master reasoned that under the proviso to § 6(e), the United States would retain ownership only of "wildlife refuges or reservations *already established at statehood.*" *Ibid.* (emphasis added). Because the application had not yet been granted, the proviso to § 6(e) would not prevent the transfer of lands within the Range to Alaska.

We disagree. Under the Master's interpretation, § 6(e) applies only to completed reservations of land. But Congress did not limit § 6(e) to completed reservations. Rather, Congress provided that the United States would not transfer to Alaska lands "withdrawn or *otherwise set apart* as refuges" for the protection of wildlife. (Emphasis added.) The Master's reading of § 6(e) would render the broader terminology superfluous. The Court will avoid an interpretation of a statute that "renders some words altogether redundant." *Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 574 (1995). In light of Congress' clear intent, it was error for the Master to conclude that the lands within the Range were not "otherwise set apart as [a] refug[e]" unless the United States could point to a completed reservation. In the phrase "set apart as [a] refug[e]," the word "as" does not carry the requirement that the refuge be presently established; the phrase aptly describes the administrative segregation of lands designated to become a wildlife refuge. Accordingly, the application and regulation, taken together, placed the Range squarely within the proviso of § 6(e), preventing a transfer of lands covered by the application to Alaska.

The partial dissent's contrary conclusion rests on the view that the lands covered by the application "had no certainty of ever becoming a refuge or reservation." *Post*, at 71 (THOMAS, J., concurring in part and dissenting in part). But the dissent identifies nothing in § 6(e) requiring "certainty" that a projected final action will in fact occur, converting lands designated for a particular use into lands so used, in order for § 6(e)'s proviso to prevent the transfer of such lands to Alaska. Moreover, our reading of the proviso of § 6(e) is reinforced by Alaska's concession that the *uplands* within the Range are held by the United States, not Alaska. Tr. of Oral Arg. 79; Letter from Attorney General Bruce M. Botelho to the Clerk of the Court, Mar. 3, 1997, p. 1. If the Master were correct that the application and regulation did not operate to "set apart" *submerged* lands in the proposed Range within the meaning of § 6(e), then it follows that the same instruments could not set apart *uplands* within the Range. Nevertheless, Alaska disclaims ownership of the uplands. The State argues that it could only have claimed uplands within the Refuge under § 6(b) of the Alaska Statehood Act, which authorized Alaska to select a specified amount of "vacant, unappropriated, and unreserved" federal land. Since Alaska did not select the uplands before the Secretary of the Interior approved the application for the Range in 1960, and since after 1960 the uplands were no longer "vacant, unappropriated, and unreserved," the State cannot now argue that it owns the uplands. *Ibid.* But the State's argument ignores the main clause of § 6(e). Under that clause, the United States transferred to Alaska "[a]ll real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska . . . ." The State does not explain why all of the lands within the Range—uplands as well as submerged lands—would not have been transferred to Alaska at statehood as real property used for the protection of wildlife unless covered by the proviso. Unless all lands—submerged lands and uplands—covered by the application were "set apart" within the meaning of the proviso to § 6(e), they would have passed to Alaska under the main clause of § 6(e). There is no basis for concluding that the United States retained uplands but not submerged lands within the Range.

C

In sum, we conclude that the United States did not transfer to Alaska submerged lands within the Range at statehood. The 1957 application to create the wildlife refuge clearly encompassed submerged lands. Since its seaward boundary is the low-water line along Alaska's coast, the Range necessarily encompasses the tidelands. Further reflecting an intent to withhold submerged lands is the statement of justification accompanying the application, which describes the habitat of various species along the coast and beneath inland waters. A Department of the Interior regulation in effect when the application was filed and when Congress passed the Alaska Statehood Act operated to "segregate" the lands for which the application was pending. Section 6(e) of the Alaska Statehood Act expressly prevented lands that had been "set apart as [a] refug[e]" from passing to Alaska. It follows that, because all of the lands covered by the 1957 application had been "set apart" for future use as a refuge, the United States retained title to submerged lands within the Range. We therefore sustain the United States' exception to the Master's recommendation.

VI

We overrule Alaska's exceptions to the Special Master's recommended rulings that (1) Alaska's submerged lands in the vicinity of barrier islands should be measured as a 3-mile belt from a coastline following the normal baseline under the Convention on the Territorial Sea and the Contiguous Zone; (2) Dinkum Sands is not an island constituting part of Alaska's coastline under the Submerged Lands Act; and (3) submerged lands beneath tidally influenced waters within the boundary of the National Petroleum Reserve-Alaska did not pass to Alaska at statehood. We sustain the United States' exception to the Special Master's recommended ruling that offshore submerged lands within the boundaries of the Arctic National Wildlife Refuge passed to Alaska at statehood.

The recommendations of the Special Master are adopted to the extent that they are consistent with this opinion. The parties are directed to prepare and submit an appropriate decree for this Court's consideration. The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as from time to time may be determined necessary or advisable to effectuate and supplement the forthcoming decree and the rights of the respective parties.

The parties shall bear their own costs.

It is so ordered.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, concurring in part and dissenting in part.

I agree with the Court that the limit of inland waters in the area of Stefansson Sound should be determined by reference to the Convention on the Territorial Sea and the Contiguous Zone, in which Alaska's proposed 10-mile rule finds no purchase. I also agree that Dinkum Sands is not an island within the meaning of the Convention. Accordingly, I join Parts I, II, and III of the Court's opinion. I do not share the Court's view that the United States holds title to submerged lands within National Petroleum Reserve Number 4. Nor do I agree with the Court's conclusion that, "at the time of [Alaska's] statehood," the then-unapproved application to create the Arctic Wildlife Range "expressly retained" the submerged lands within the boundaries described in that application under the Submerged Lands Act. I thus respectfully dissent from Parts IV and V of the Court's opinion.

I

I turn first to the Court's discussion of the National Petroleum Reserve. The Master's Report posited two possible measures for the specificity with which Congress must declare its intent to retain submerged lands that would otherwise pass to a new State. For those lands under inland waters—lands historically viewed as held by the United States "for the ultimate benefit of future States," *Utah Div. of State Lands* v. *United States*, 482 U. S. 193, 201 (1987) (internal quotation marks omitted)—the Special Master employed a strict presumption of state ownership. The Master determined that lands under the territorial sea—those lands vested in the States solely by the Submerged Lands Act—ought to be presumed to remain in federal hands under "the principle that federal grants are to be construed strictly in favor of the United States." *California ex rel. State Lands Comm'n* v. *United States*, 457 U. S. 273, 287 (1982).

It is my view, however, that, since the enactment of the Submerged Lands Act, the test for determining whether submerged lands—inland or territorial—are conveyed to a newly created State or retained by the United States is that set forth in the Act.

Following in the wake of our decision in *United States* v. *California*, 332 U. S. 19 (1947), as it did, the Submerged Lands Act is widely recognized for having deeded to coastal States the submerged lands lying within 3-mile bands surrounding their coasts. See § 3(a), 43 U. S. C. § 1311(a); see also *United States* v. *Maine*, 420 U. S. 515, 525 (1975). The Act declared it in the

> "public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within

> such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States . . . ." § 3(a).

The definition of "lands beneath navigable waters" included those submerged lands under the territorial sea. See § 2(a)(2), 43 U. S. C. § 1301(a)(2). The Act's undertaking to "ves[t] in and assig[n] to" the States the rights to those lands thus conveyed to the States lands that this Court had found in *United States* v. *California* to be exclusively federal enclaves. The definition of "lands beneath navigable waters" also included those lands beneath *inland* waters. See § 2(a)(1) (defining "lands beneath navigable waters" to include "all lands within the boundaries of each of the respective States which are covered by *nontidal* waters that were navigable" (emphasis added)). Accordingly—and the majority and I agree to this point—coastal States entering the Union after the passage of the Submerged Lands Act gained title to offshore submerged lands and to inland submerged lands through the operation of that statute.

Section 3, which conveyed and confirmed the States' title to submerged lands, was subject to a series of exceptions. As relevant here, § 5 of the Act excepted from § 3's terms "all lands *expressly retained* by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea)." § 5(a), 43 U. S. C. § 1313(a) (emphasis added). As to lands beneath the marginal (or territorial) sea, it is undisputed that the "expressly retained" exception sets forth the test for determining whether a withdrawal or reservation of land by the United States is effective in preventing conveyance of title to submerged lands. It seems clear to me that it is also the test for determining whether the United States has retained title to inland submerged lands. Section 3(a) lands include those beneath both inland and territorial waters. In the case of a State, like Alaska, that received title to *all* of its submerged lands by virtue of the Submerged Lands Act, there is no need to consult conflicting presumptions, two-part tests, or anything other than the stated policy on which Congress has finally settled.[1]

The Court seems to agree with me that the Act is now the expression of Congress' policy on submerged lands retention. But, the Court also seems to view the phrase "expressly retained" in the Act as shorthand for the test we employed in *Utah Div. of State Lands,* a case decided three decades after passage of the Act. That is, to determine whether submerged lands have been "expressly retained," we must determine whether Congress "*clearly intended* to include land under navigable waters within the federal reservation," and whether Congress "*affirmatively intended* to defeat the future State's title to such land." 482 U. S., at 202 (emphases added). I find the Court's reading of the "expressly retained" language curious. First, as I discuss below, the language does not lend itself to the Court's construction. Second, it is not the case that the test set forth in *Utah Div. of State Lands* was simply a restatement of the test employed by the Court before the enactment of the Submerged Lands Act. Were it so, then the majority's assertion that the standard in the Act was described in pre-Act cases and simply "carried forward," *ante,* at 36, into *Utah Div. of State Lands* might be colorable. As it happens, in *Utah Div. of*

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[1] It is, I think, an open question whether the Submerged Lands Act has any operation as to land beneath inland waters in States that entered the Union prior to its enactment, thus initially obtaining title to submerged lands independently of the Act. Determining whether and how the Act applies to pre-existing States involves, at the least, complex retroactivity questions not presented by this case, given that Alaska became a State after the enactment of the Submerged Lands Act, which Alaska's Statehood Act expressly incorporates.

State Lands, the Court addressed for the first time the argument that a retention—as opposed to a conveyance—of submerged lands by the United States could defeat a future State's title to those lands, 482 U. S., at 200. In response, the Court crafted the two-part test relied on by the majority today. *Id.,* at 202. Whatever can be said of that test, it was not before the drafters of the Submerged Lands Act. Accordingly, there is no reason to believe that, when Congress employed the phrase "expressly retained," it intended a meaning not obvious from those words and not set forth in an opinion of this Court until three decades after the Act became effective.

But the Submerged Lands Act, I think, embraces at least part of the policy that we had attributed to Congress in several pre-Act cases. We have, for example, stated that we would not affirm a conveyance of inland submerged lands that was not set out in "clear and especial words," *Martin* v. *Lessee of Waddell,* 16 Pet. 367, 411 (1842), or "unless the claim . . . in terms embraces the land under the waters of the stream," *Packer* v. *Bird,* 137 U. S. 661, 672 (1891). It is, I believe, the meaning of these passages that "expressly retained" captures. Because the only "lands" described in § 3(a) of the Act are *submerged* lands, the requirement that any retention of them be "expres[s]" means that the retention must "in terms embrac[e] the land under the waters." Accordingly, contrary to the Master's conclusion and much of the majority's analysis, a retention of lands cannot be inferred from, for example, the purpose of a given attempted federal undertaking. To be sure, prior to the passage of the Submerged Lands Act, the Court looked beyond the words used in efforts to prevent passage of submerged lands to newly created States. For example, in *United States* v. *Holt State Bank,* 270 U. S. 49 (1926), the Court noted that "disposals by the United States during the territorial period are *not lightly to be inferred,* and should not be regarded as intended unless the intention was definitely declared or *other-*

wise made very plain." *Id.*, at 55 (emphases added). After the enactment of the Submerged Lands Act, it appears that not only is retention of submerged lands not "lightly to be inferred," it is not to be inferred at all. In this respect, Congress has required of itself a higher standard than either the Master or the majority attribute to it.[2]

Neither the Master, in his exhaustive Report, nor the majority, in its only slightly less exhaustive opinion, cites anything meeting what I believe to be the requirement of an express retention of submerged lands within the boundaries of the National Petroleum Reserve. The majority focuses, instead, on the "*purpose* of a conveyance or reservation" as a "critical factor in determining federal intent." *Ante*, at 39 (emphasis in original). The Court concludes that the purposes for establishing the Reserve—primarily to ensure federal possession of petroleum resources within the Reserve's boundaries—would be undermined if the United States did not retain the submerged lands. So "[i]t is simply not plausible," says the majority, "that the United States sought to reserve only the upland portions of the area." *Ante*, at 39–40. To me, these considerations are wholly beside the point. Congress, when it incorporated the Submerged Lands Act into § 6(m) of the Alaska Statehood Act, Pub. L. 85–508, 72 Stat. 343, demanded of itself an *express* retention of submerged lands to prevent their passage to Alaska. If Congress had the purpose attributed to it by the majority, the best way—indeed, the only legal way—for it to realize that purpose was to state "expressly" that the submerged lands inside the

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[2] Section 5(a)'s standard is at the same time somewhat more generous to the United States. In *Utah Div. of State Lands* v. *United States*, 482 U. S. 193 (1987), we asserted that a reservation—as opposed to a conveyance—of land would not be held to defeat state title to submerged lands even if those lands were manifestly included in the reservation where there was lacking an indication from Congress that it "affirmatively" intended to defeat a future State's title to those lands. See *id.*, at 202. This was, we thought, required by congressional policy. I do not, however, perceive that requirement in the language of § 5(a).

National Petroleum Reserve were retained for the United States. It may well be, as the majority concludes, that Congress can retain lands by ratification of or reference to an earlier instrument describing those lands (the majority points here to President Harding's 1923 Executive Order). But, congressional ratification of an instrument that does not—as President Harding's order does not—"in terms embrac[e] the land under the waters" cannot, anymore than a statute that fails to do so, constitute an express retention as required by the Submerged Lands Act.[3]

Absent an express retention of submerged lands, the Submerged Lands Act effected the transfer of all submerged lands within the Territory of Alaska to the State of Alaska—including those within the boundaries of National Petroleum Reserve Number 4. I dissent from the Court's contrary conclusion.

II

The majority rejects the Master's recommendation that Alaska be found to hold title to the submerged lands within the Arctic National Wildlife Refuge. Although I acknowledge that the question is close, I agree with the Master and would overrule the United States' exception.[4]

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[3] The majority points to a prestatehood enactment, Pub. L. 85–303, §2(a), 71 Stat. 623, granting certain offshore lands to the Territory of Alaska, but excepting from that grant "'oil and gas deposits located in the *submerged lands*'" along the Arctic coast of the Reserve. See *ante*, at 42 (emphasis in original). This statute is said to "reinforc[e]" the "conclusion that Congress was aware when it passed the Alaska Statehood Act that the Reserve encompassed submerged lands." *Ibid.* But the statute proves little more than that Congress was, *circa* Alaska's statehood, capable of expressly referring to submerged lands. It does not—and the majority does not claim that it could—operate as an express retention.

[4] This conclusion arises out of my review of the United States' exception to the Master's recommendation on Question 9. Before I turn to it, I must admit some bafflement as to why the majority undertakes a review of the Master's recommendation on Question 10. See *ante*, at 51–55. In answer to Question 10, the Special Master, using reasoning parallel to that of his discussion of National Petroleum Reserve No. 4, concluded that the

The United States contends that the submerged lands within the Refuge were "expressly retained" when Alaska became a State. Section 5 of the Alaska Statehood Act keeps for the United States "title to all property, real and personal, to which it has title, including public lands." 72 Stat. 340. The various subsections of § 6 of the Statehood Act exclude from that general retention a variety of lands. Section 6(e) provides that federal agencies will "transfe[r] and conve[y]" to Alaska "[a]ll real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska" under three statutes. *Ibid.* A proviso to § 6(e), however, states that "such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife." *Id.*, at 341.[5]

The United States contends that the Refuge was, as of Alaska's statehood, "set apart as [a] refug[e]." This was accomplished, it is argued, by means of an application filed with the Secretary of the Interior in November 1957 by the Bureau of Sport Fisheries and Wildlife "to establish an Arctic Wildlife Range" within certain lands in Alaska's northeastern corner. See Report of Special Master 447, n. 1 (Report)

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application for withdrawal of the land within the Refuge included submerged lands. Alaska failed to file an exception to that recommendation, and we have no more occasion to take it up than any of the several other questions on which the Master offered recommendations to which neither party has objected. Because it is not before us, I express no view on the Master's conclusion as to Question 10.

[5] The term "lands" employed in § 6(e) is presumably to be read *in pari materia* with the same term in § 5. Section 5 makes no express mention of submerged lands, so one can inquire whether, under the Submerged Lands Act, § 5 (never mind § 6(e), which, as a proviso to an exception to § 5, cannot outstrip § 5) "expressly retained" submerged lands for the United States. Alaska, in forgoing its right to except to the Master's recommendation as to Question 10, has, I think, given up its opportunity to make any such argument and I will not take it up.

(citing Alaska Exh. 81).[6] The Government does not argue that the Refuge was "withdrawn" by the application within the meaning of § 6(e). See Brief for United States 41; Report 463. Rather, the application falls within § 6(e) because, we are told, the application "was the legal mechanism by which the Interior Department at that time 'set apart' public lands for the creation of a wildlife refuge." Brief for United States 41. Under the Department of the Interior's regulations in effect at the time, the effect of an application was to "temporarily segregate such lands from settlement, location, sale, selection, entry, lease, and other forms of disposal under the public land laws, . . . to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal." 43 CFR § 295.11(a) (1958), 22 Fed. Reg. 6614 (1957). The regulation further provided that "[s]uch temporary segregation shall not affect the administrative jurisdiction over the segregated lands." *Ibid.*

The Master acknowledged the regulation's effect, but determined that, while it may have been to "set apart" the submerged lands within the Range, the lands were not "set apart *as* a refuge or reservation." Report 464 (emphasis in original). The majority disagrees, asserting that "[i]n the phrase 'set apart as [a] refug[e],' the word 'as' does not carry the requirement that the refuge be presently established." *Ante*, at 59. "[T]he phrase," concludes the majority, "aptly describes the administrative segregation of lands designated to become a wildlife refuge." *Ibid.*

I disagree. As the language of the Bureau of Sport Fisheries and Wildlife's application made clear, at the time of the application (and at the time of statehood), no one could say with any certainty what lands—if any—included within the boundaries set forth in the application were at that time "designated to become a wildlife refuge." See Report 447,

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[6] The United States no longer contends that the application, of its own force, "expressly retained" submerged lands. See Brief for United States 29.

n. 1 ("'The purpose of this withdrawal is to establish an Arctic Wildlife Range within all or *such portion of the described lands as may be finally determined to be necessary* for the preservation of the wildlife and wilderness resources of that region of northeastern Alaska'" (quoting Alaska Exhibit 81, p. 1) (emphasis added)). Not only was it unknown whether the lands (or any of them) would ultimately become a refuge or reservation, but also, during the pendency of the application, the "administrative jurisdiction" over the lands remained with the Bureau of Land Management. See 43 CFR §295.11(a) (1958). The Fish and Wildlife Service did not begin to administer the Refuge until the application for it was finally adopted after Alaska's statehood. See Report 464. As of the time of the Alaska Statehood Act, the lands within the application had no certainty of ever becoming a refuge or reservation, and were not then administered as one.

This is not to say that the application and regulation did not have any effect on the lands described in the application. The lands within the application were, by operation of the regulation, free from certain "forms of disposal" during the pendency of the application. 43 CFR §295.11(a) (1958). I am willing to agree with the Master and the majority that, under the regulation, the lands were "set apart." But, they were "set apart" temporarily and merely to preserve the status quo pending the Secretary's decision on the application in order that a decision by the Secretary that such lands should become a refuge or reservation would not be a nullity. Contrary to the suggestion of the United States that the regulation "was the legal mechanism by which the Interior Department at that time 'set apart' public lands for the creation of a wildlife refuge," Brief for United States 41, that regulation applied to all applications for withdrawals or reservations of land, not merely those to create wildlife refuges. See, *e. g.*, 43 CFR §295.9 (1958) (listing who may apply for withdrawals or reservation without limitation to agencies seeking to create wildlife refuges). In my view, then, the Master overstated the effect of the application and regulation when he said that they "caused land to be set apart *for the purpose of a wildlife reservation.*" Report 464 (emphasis added). The effect of the set-apart was to ensure that any decision to create a wildlife refuge—if that were the decision ultimately made—would not be undermined by prior land actions adverse to any such decision. Only if the procedures that intervened between the Bureau's application and the Secretary's decision were merely ministerial, which the Government is wise not to argue, see 43 CFR § 295.12 (1958) (describing procedures), could the set-apart be accurately described as "*for the purpose* of a wildlife reservation." Thus, it goes without saying that I do not agree with the majority's even more ambitious conclusion that the lands were "set apart *as* [a] refug[e]."[7]

Nor do I agree with the majority's contention that the Master's reading would render the "otherwise set apart" portion of § 6(e) redundant, as only a "completed reservation" of land would prevent that land from passing to Alaska. *Ante,* at 59. I believe that the proviso in § 6(e) is set forth in broad language in an attempt to capture all ways in which a refuge or reservation for the protection of wildlife can be created—not unlike Congress' attempt in § 3(a) of the Submerged Lands Act to capture every way in which title to submerged lands could be conferred. See *supra,* at 63. Accordingly, Congress' use of the phrase "lands withdrawn or otherwise set apart" fairly encompasses every way in which lands can be segregated "as refuges or reservations." Requiring a completed refuge or reservation—by whatever means created—does not render any portion of the proviso redundant.

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[7] That Alaska has acquiesced in the United States' ownership of the uplands within the boundaries of the Refuge says nothing whatever about Congress' intent in enacting the Alaska Statehood Act. Accordingly, I do not understand the majority's citation to this point. *Ante,* at 60. Indeed, if Alaska's poststatehood actions are relevant, it must surely be equally relevant that Alaska strenuously *disputes* ownership of the submerged lands within the Refuge.

For these reasons, I conclude that the Master correctly determined that the Bureau's application was not sufficient for purposes of § 6(e)'s proviso. I would overrule the United States' exception to his recommendation.

III

I would overrule Alaska's exceptions to the Master's recommendation on the method for determining the limits of Alaska's offshore submerged lands, and his recommendation concerning Dinkum Sands' insular status. I concur with the majority on these two points. I would also overrule the United States' exception to the Master's recommendation concerning the Arctic Wildlife Refuge. And, finally, I would sustain Alaska's objection to the Master's recommendation as to the ownership of submerged lands within National Petroleum Reserve No. 4. On these last two points, I respectfully dissent.

ABRAMS ET AL. *v.* JOHNSON ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

No. 95–1425. Argued December 9, 1996—Decided June 19, 1997*

The electoral district lines for Georgia's congressional delegation are here a second time, appeal now being taken from the District Court's rulings and determinations on remand after *Miller* v. *Johnson*, 515 U. S. 900, in which this Court affirmed the finding that the State's Eleventh District was unconstitutional because race was a predominant factor in its drawing, *id.*, at 915–917. The plan challenged contained three majority-black districts, and after remand the complaint was amended to challenge another of these, the then-Second District, which the trial court found was also improperly drawn under *Miller.* The court deferred to Georgia's Legislature to draw a new plan, but the legislature could not reach agreement. The court then drew its own plan, containing but one majority-black district, the Fifth; this Court declined to stay the order; and the 1996 general elections were held under it. The appellants, various voters and the United States, now seek to set the trial court's plan aside, claiming that it does not adequately take into account the interests of Georgia's black population.

Held: The District Court's redistricting plan is not unconstitutional. Pp. 79–101.

(a) The trial court did not exceed its remedial power under the general rule of *Upham* v. *Seamon*, 456 U. S. 37, 43 *(per curiam)*, whereby courts drawing voting district lines must be guided by the legislative policies underlying the existing plan, to the extent they do not lead to violations of the Constitution or the Voting Rights Act of 1965 (Act). Appellants' argument that this rule required the trial court to adopt three majority-black districts, as in the 1992 plan at issue in *Miller*, or two such districts, as in the Georgia Legislature's original 1991 plan, is unavailing, given the background against which the legislature—and later the trial court—attempted to draw districts. The considerable evidence of Justice Department pressure on Georgia to create the maximum number of majority-black districts, leading the state legislature to act based on an overriding concern with race, disturbed any sound basis for the trial court to defer to the 1991 plan; the unconstitutional pre-

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*Together with No. 95–1460, *United States* v. *Johnson et al.*, also on appeal from the same court.

dominance of race in the 1992 plan's provenance of the Second and Eleventh Districts caused them to be improper departure points; and the proposals for either two or three majority-black districts in plans urged in the remedy phase of this litigation were flawed by evidence of predominant racial motive in their design. Thus, the trial court acted well within its discretion in deciding it could not draw two majority-black districts without engaging in racial gerrymandering. Pp. 79–90.

(b) The court-ordered plan does not contravene § 2 of the Act, a violation of which occurs if "it is shown that the political processes leading to . . . election . . . are not equally open to participation by members of [a racial minority] . . . ," 42 U. S. C. § 1973(b). The Court rejects appellants' contrary position premised on impermissible vote dilution in the trial court's failure to create a second majority-black district. A plaintiff seeking to establish such dilution must, *inter alia,* meet three requirements set forth in *Thornburg* v. *Gingles,* 478 U. S. 30, 50–51. Because the trial court found, without clear error, that the black population was not sufficiently compact for a second majority-black district, the first of these factors is not satisfied. Nor can it be said, given evidence of significant white crossover voting, that the trial court clearly erred in finding insufficient racial polarization to meet the second and third *Gingles* factors, that the minority group is "politically cohesive" and that the majority votes sufficiently as a bloc to enable it to defeat the minority's preferred candidate. The Court disagrees with appellants' arguments that the trial court's § 2 findings are not owed deference because its rulings that § 2 required maintenance of the Fifth District but not creation of a new majority-black district are inconsistent, because it did not hold a separate hearing on whether its remedial plan violated § 2, and because it barred private intervention to defend the Second District's constitutionality. Pp. 90–95.

(c) The plan does not violate § 5 of the Act, which requires that covered jurisdictions obtain either administrative preclearance by the United States Attorney General or approval from the United States District Court for the District of Columbia for any voting-procedure change, and that such a change "not have the purpose [or] effect of denying or abridging the right to vote on account of race or color," 42 U. S. C. § 1973c. The section aims to prevent changes leading to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise. *Beer* v. *United States,* 425 U. S. 130, 141. Although a court-devised redistricting plan such as the one at issue need not be precleared under § 5, *Connor* v. *Johnson,* 402 U. S. 690, 691 *(per curiam),* the court should take into account the appropriate § 5 standards in fashioning such a plan, *McDaniel* v. *Sanchez,* 452 U. S. 130, 149. Even were this Court to accept one of appellants' proposed benchmarks for measuring retrogression, their desired remedy would be impermissible because they have not demonstrated it was possible to create a second majority-black district within constitutional bounds. Moreover, none of their proposed benchmarks—the 1991 plan, the State's supposed policy of creating two majority-black districts, and the 1992 plan shorn of its constitutional defects—was ever in effect, and thus none could operate as a benchmark under the Attorney General's regulations and, *e. g., Holder* v. *Hall,* 512 U. S. 874, 883–884. Nor can the 1992 plan, constitutional defects and all, be the benchmark, since § 5 cannot be used to freeze in place the very aspects of a plan found unconstitutional. The appropriate benchmark is, in fact, what the District Court concluded it would be: the 1982 plan, in effect for a decade. Appellants have not shown that black voters in any particular district suffered a retrogression in their voting strength under the court plan measured against the 1982 plan. Pp. 95–98.

(d) The plan does not violate the constitutional guarantee of one person, one vote under Article I, § 2. Although court-ordered districts must ordinarily achieve that provision's goal of population equality with little more than *de minimis* variation, *e. g., Chapman* v. *Meier,* 420 U. S. 1, 26–27, slight deviations are allowed upon enunciation of unique features or historically significant state policies, *id.,* at 26, including, *e. g.,* the desire to respect municipal boundaries and to preserve the cores of prior districts, *Karcher* v. *Daggett,* 462 U. S. 725, 740. Here, the trial court's plan has an overall population deviation lower than any other plan presented to it which was not otherwise constitutionally defective. Moreover, the court recited in detail those factors supporting the plan's slight deviation, including Georgia's strong historical preference for not splitting counties outside the Atlanta area and for not splitting precincts, as well as the State's interests in maintaining core districts and communities of interest, given its unusually high number of counties. Even if this Court found the plan's population deviation unacceptable, the solution would not be adoption of appellants' constitutionally infirm, race-based, plans, but simply the shifting of a few precincts to even out the districts with the greatest deviations. Moreover, equitable considerations—the passage of more than six years since the census on which appellants' data is based and Georgia's ongoing and dramatic population shifts and changes—disfavor requiring yet another reapportionment to correct the court plan's deviation. See *id.,* at 732. Pp. 98–101.

922 F. Supp. 1556, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post*, p. 103.

Deputy Solicitor General Waxman argued the cause for the United States. With him on the briefs were *Acting Solicitor General Dellinger, Assistant Attorney General Patrick, Deputy Solicitor General Bender, James A. Feldman, Steven H. Rosenbaum,* and *Miriam R. Eisenstein. Laughlin McDonald* argued the cause for appellants Abrams et al. With him on the briefs were *Neil Bradley, Mary Wyckoff, Elaine R. Jones, Norman J. Chachkin, Jacqueline Berrien,* and *Gerald R. Weber.*

Michael J. Bowers, Attorney General of Georgia, argued the cause for appellees Miller et al. With him on the brief were *Dennis R. Dunn,* Senior Assistant Attorney General, and *David F. Walbert,* Special Assistant Attorney General. *A. Lee Parks* argued the cause and filed a brief for appellees Johnson et al.†

JUSTICE KENNEDY delivered the opinion of the Court.

The electoral district lines for Georgia's congressional delegation are before us a second time, appeal now being taken from the trial court's rulings and determinations after our remand in *Miller* v. *Johnson,* 515 U. S. 900 (1995). The three-judge panel of the United States District Court for the Southern District of Georgia was affirmed in *Miller* after it found the Eleventh Congressional District unconstitutional as then drawn. Race, we held, must not be a predominant factor in drawing the district lines. *Id.,* at 915–917.

Given the contorted shape of the district and the undue predominance of race in drawing its lines, it was unlikely the district could be redrawn without changing most or all of Georgia's congressional districts, 11 in total number. The plan being challenged contained three majority-black districts, and after our remand the complaint was amended to challenge another of these, the then-Second District. The trial court found this district, too, was improperly drawn under the standards we confirmed in *Miller. Johnson* v. *Miller*, 922 F. Supp. 1552 (1995).

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†*J. Gerald Hebert* filed a brief for the Georgia Association of Black Elected Officials as *amicus curiae* urging reversal.

Sharon L. Browne and *Deborah J. La Fetra* filed a brief for the Pacific Legal Foundation as *amicus curiae* urging affirmance.

For the task of drawing a new plan, the court deferred to Georgia's Legislature, but the legislature could not reach agreement. The court then drew its own plan, *Johnson* v. *Miller*, 922 F. Supp. 1556 (1995); we declined to stay the order; and the 1996 general elections were held under it. The court's plan contained but one majority-black district. The absence of a second, if not a third, majority-black district has become the principal point of contention. Though the elections have been completed, the plan remains in effect until changed by a valid legislative Act, and the appellants ask us to set it aside.

The private appellants are various voters, defendant-intervenors below, who contend that the interests of Georgia's black population were not adequately taken into account. The United States, also a defendant-intervenor, joins in the appeal. The state officials, defendants below, do not object to the plan and appeared before us as appellees to defend it. The other set of appellees are the private plaintiffs below, who argued that racial gerrymandering under the previous plan violated their right to equal protection.

The private appellants attack the court's plan on five grounds. First, citing *Upham* v. *Seamon*, 456 U. S. 37 (1982) *(per curiam)*, they say the District Court erred in disregarding the State's legislative policy choices and in making more changes than necessary to cure constitutional defects in the previous plan. Second and third, they allege the plan violates §§ 2 and 5 of the Voting Rights Act of 1965, 42 U. S. C. §§ 1973, 1973c. Fourth, they argue the court's plan contains significant population deviations and so violates the constitutional one-person, one-vote requirement. Fifth, they claim the District Court erred in not allowing private intervention on the question of the Second District's unconstitutionality. The Justice Department included questions one, two, and four in its jurisdictional statement. Private appellants did not brief their fifth contention, and we will not address it. The remaining challenges are unavailing as well, and we affirm the judgment of the District Court.

I

We first address appellants' argument that the court exceeded the remedial power authorized by our decisions, particularly *Upham* v. *Seamon, supra,* by failing to follow policies of the state legislature. When faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying the existing plan, to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act. 456 U. S., at 43. Much of the argument from the parties centers around what legislative redistricting principles the District Court should have acknowledged in drawing its plan. The appellants say the relevant redistricting guideline should be the three majority-black districts of the precleared plan at issue in *Miller* v. *Johnson;* and, if not, the two majority-black districts in an earlier legislative effort. These contentions require us to recite some of the background against which the Georgia Legislature—and later the trial court—attempted to draw the districts.

A

Much of the history is recounted in *Miller* v. *Johnson,* and we repeat only some of it here. The need for redistricting arose in 1990 when Georgia, because of its population increase, went from 10 authorized congressional seats to 11. To move ahead with redistricting, a special session of the legislature opened in August 1991. Because Georgia is a covered jurisdiction under § 4(b) of the Voting Rights Act, 42

U. S. C. § 1973b(b), § 5 of the Act requires it to obtain either administrative preclearance by the Attorney General or approval by the United States District Court for the District of Columbia for any change in a "standard, practice, or procedure with respect to voting." 42 U. S. C. § 1973c. The proposed change must not have the purpose or effect "of denying or abridging the right to vote on account of race or color." *Ibid.* The legislature submitted a plan to the Attorney General for preclearance on October 1, 1991. See Appendix to this opinion (hereinafter Appendix), fig. 1. The plan contained two majority-black districts, the Fifth and the Eleventh. Previously, Georgia had one majority-black district, the Fifth.

The Department of Justice refused preclearance of this plan in January 1992. It then refused preclearance of a second plan submitted by the legislature, also with two majority-black districts. In its second refusal, the Department of Justice cited several alternative plans proposing three majority-black districts, including one called the "max-black" plan, drafted by the American Civil Liberties Union (ACLU) for the General Assembly's black caucus. At that point, the General Assembly set out to create three majority-black districts to gain preclearance. See Appendix, fig. 2. The plan as adopted used the ACLU's max-black plan as a model. One of the three majority-black districts, the Eleventh, was a geographic "'monstrosity, stretching from Atlanta to Savannah. Its core is the plantation country in the center of the state, lightly populated, but heavily black. It links by narrow corridors the black neighborhoods in Augusta, Savannah and southern DeKalb County.'" 515 U. S., at 909 (quoting M. Barone & G. Ujifusa, Almanac of American Politics 356 (1994)). The district as so drawn served its purpose, however, which was to secure preclearance from the Department of Justice.

On November 4, 1992, elections were held under the new plan, and all three majority-black districts elected black candidates. In 1994, five white voters from the Eleventh District filed suit in the United States District Court for the Southern District of Georgia, alleging a racial gerrymander in the lines of the Eleventh District, in violation of the Equal Protection Clause as interpreted in *Shaw* v. *Reno*, 509 U. S. 630 (1993). The District Court panel found the district invalid, with one judge dissenting. *Johnson* v. *Miller*, 864 F. Supp. 1354 (1994).

We affirmed. *Miller* v. *Johnson*, 515 U. S. 900 (1995). We rejected appellants' argument that "regardless of the legislature's purposes, a plaintiff must demonstrate that a district's shape is so bizarre that it is unexplainable other than on the basis of race." *Id.*, at 910. We said "the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts." *Id.*, at 911. And we explained that "[t]he plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Id.*, at 916.

We upheld two principal findings of the District Court indicating race was the predominant factor in constructing the Eleventh District. First, it was " 'exceedingly obvious' " from the district's contorted shape, together with the relevant racial demographics, that it was designed to bring in black populations. *Id.*, at 917 (quoting 864 F. Supp., at 1375). Second, considerable evidence—including the State's own concessions—showed that the General Assembly was driven by "a predominant, overriding desire" to create three majority-black districts to satisfy the Department of Justice. 515 U. S., at 917. The Justice Department, indeed, " 'would accept nothing less than abject surrender to its maximization agenda.' " *Ibid.* (quoting 864 F. Supp., at 1366, n. 11).

We then considered whether the race-based districting satisfied strict scrutiny because it was narrowly tailored to achieve a compelling governmental interest. As we noted, "[o]ur presumptive skepticism of all racial classifications" prohibited us "from accepting on its face the Justice Department's conclusion that racial districting is necessary under the Voting Rights Act." 515 U. S., at 922. After reviewing the evidence, we concluded that "[i]nstead of grounding its objections on evidence of a discriminatory purpose, it would appear the Government was driven by its policy of maximizing majority-black districts." *Id.*, at 924.

On remand, the District Court deferred to the Georgia Legislature, giving it time to draw a new congressional map. The Governor called a special session of the General Assembly, which met from August 14 to September 12, 1995. The legislature, however, deadlocked on the congressional reapportionment plan. The Georgia House of Representatives adopted a plan with two majority-black districts, Status Report of Defendants Miller, Howard, and Cleland, Aug. 31, 1995, Record, Pleadings Vol. 11, Doc. No. 295, while the Senate adopted a plan with one, Status Report of Defendants Miller, Howard, and Cleland, Sept. 5, 1995, *id.*, Doc. No. 300. On September 13, 1995, defendants notified the District Court that the legislature was unable to resolve its differences and had adjourned, leaving the District Court to develop a remedy.

Plaintiffs had moved to amend their complaint to challenge the Second District as unconstitutional on the same grounds as the Eleventh District, and the court received additional evidence for the purpose. None of the private defendant-intervenors lived in the Second District and, assuming their lack of standing to defend it, they asked for the addition of other parties. The court disallowed the request, ruling the State could defend this aspect of the plan under review.

The court found that race was the "overriding and predominant factor" in drawing the Second District's borders. 922

F. Supp., at 1553. The district, the court noted, split 12 of the district's 35 counties, 28 of its precincts, and numerous cities. Linda Meggers, Director of Reapportionment Services for the Georgia General Assembly, was qualified as an expert witness and testified it was not possible to create a majority-black Second District without including the black population centers in Columbus and Muscogee Counties, Albany and Dougherty Counties, and Macon and Bibb Counties, which account for most of these splits. She also testified that in constructing the Second District, she followed the ACLU's max-black plan. *Id.*, at 1554–1555. As with the Eleventh District, the trial court found no compelling reason for the race-based districting of the Second District sufficient to survive strict scrutiny. The appellants do not appeal the determination by the trial court that the Second District as drawn could not survive scrutiny under the standards set forth in *Miller*, but they do say the trial court erred in not devising a second majority-black district for its own plan.

During the remedy phase, the defendants proposed a variety of plans. One was the 1991 unprecleared plan passed by the Georgia Legislature, with two majority-black districts. The Eleventh District in the 1991 plan closely resembled the Eleventh District in the precleared plan, which has been found improper. The ACLU submitted four plans. One of these, ACLU 1A, with two majority-black districts, was known as the "least change" plan because it was designed to make the minimal changes perceived to be necessary to correct constitutional defects in the existing plan. Another of the ACLU plans, Abrams A, had three majority-black districts. Abrams A split nine counties in the Second District and three in the Eleventh, and for racial reasons. Yet another plan, Abrams C, had two majority-black districts. And a plan jointly sponsored by John Lewis, a black Democratic Member of the United States House of Representatives from Georgia, and Newt Gingrich, a white Republican

Member—the Lewis-Gingrich Amici-R plan—contained two majority-black districts. In response, it is said, to a submission by plaintiffs, the Justice Department submitted its "Illustrative Plan." The Justice Department did not do so, however, until after the evidence closed. The plan contained two majority-black districts and split two counties outside the Atlanta area and numerous precincts. The plaintiffs objected to the submission. The District Court mentioned the Illustrative Plan in its opinion but did not give an explicit ruling on the objection. The late submission prevented the Justice Department's demographer from being cross-examined about racial motivations, and for this reason its significance must be discounted.

The District Court considered the plans submitted by the various parties and then adopted its own. See Appendix, fig. 3. Noting the Justice Department's thorough "subversion of the redistricting process" since the 1990 census, it based its plan on the State's 1972 and 1982 plans. 922 F. Supp., at 1563. The court first had to decide where to locate the new Eleventh District, and did so in an area of significant population growth near Atlanta, so as to displace the fewest counties. It then considered Georgia's traditional redistricting principles based on maintaining: district cores, four traditional "corner districts" in the corners of the State, political subdivisions such as counties and cities, and an urban majority-black district in the Atlanta area. Protecting incumbents from contests with each other was another factor, which the court subordinated to the others because it was "inherently more political." *Id.*, at 1565. The District Court stated that, in fashioning a remedy, it considered the possibility of creating a second majority-black district but decided doing so would require it to "subordinate Georgia's traditional districting policies and consider race predominantly, to the exclusion of both constitutional norms and common sense." *Id.*, at 1566. Georgia did not have a black population of sufficient concentration to allow creation of a second majority-black district, the court found, adding that if it had the court "would have included one since Georgia's legislature probably would have done so." *Id.*, at 1567, n. 16. The resulting plan contained one majority-black district, the Fifth. The plan split no counties outside the Atlanta area. The District Court rejected potential objections to the plan based on §§2 and 5 of the Voting Rights Act and the constitutional requirement of one person, one vote.

B

Given this background, appellants say, the District Court's plan violates our direction in *Upham* v. *Seamon* to take account of legislative preferences. In *Upham*, the District Court considered a reapportionment plan passed by the Texas Legislature. The Attorney General had objected under §5 of the Voting Rights Act to a specific part of the plan, namely, the lines drawn for two contiguous districts in south Texas. He had approved the other 25 districts. The trial court, required to draw new lines, redrew not just the two districts found objectionable and their neighbors but also some unrelated districts in Dallas County, hundreds of miles to the north. 456 U. S., at 38. In the absence of a finding that the legislature's reapportionment plan offended either the Constitution or the Voting Rights Act, we held, the District Court "was not free . . . to disregard the political program" of the state legislature. *Id.*, at 43. See also *White* v. *Weiser*, 412 U. S. 783, 797 (1973).

The instant action presents a quite different situation from *Upham*, and for several reasons. In the first place, the precleared plan is not owed *Upham* deference to the extent the plan subordinated traditional districting principles to racial considerations. *Upham* called on courts to correct—not follow—constitutional defects in districting plans. 456 U. S., at 43. In *Miller*, we found that when the Georgia Legislature yielded to the Justice Department's threats, it also adopted the Justice Department's entirely race-focused approach to redistricting—the max-black policy. 515 U. S., at 917–918. Using the precleared plan as the basis for a remedy would validate the very maneuvers that were a major cause of the unconstitutional districting.

Second, the constitutional violation here affects a large geographic area of the State; any remedy of necessity must affect almost every district. In *Upham,* only 2 contiguous districts out of 27 were in violation. Here, as the District Court pointed out, 2 of 11 districts were found unconstitutional, on opposite sides of the State, districts containing between them all or parts of nearly a third of Georgia's counties. 922 F. Supp., at 1561. Almost every major population center in Georgia was split along racial lines. Under the circumstances, the District Court was justified in making substantial changes to the existing plan consistent with Georgia's traditional districting principles, and considering race as a factor but not allowing it to predominate. This approach conforms to the rule explained in *Upham.*

Appellants' most specific objection under *Upham* is that the court's plan does not contain two majority-black districts. In particular, they point to the State's original 1991 redistricting plan, denied preclearance, which contained two majority-black districts. As we have suggested above, however, the State was subjected to steady Justice Department pressure to create the maximum number of majority-black districts, and there is considerable evidence the State was predominantly driven by this consideration even in developing its 1991 plan. In support of their position, appellants rely on broad assertions in the State's brief in this Court in *Johnson* v. *Miller* that the original plan "was not perceived as a 'racial gerrymander.'" Brief for Miller Appellants in *Miller* v. *Johnson,* O. T. 1994, No. 94–631, p. 49. Against these assertions, appellees point to the testimony of Ms. Meggers, Director of Reapportionment Services for the Georgia General Assembly, that the second majority-black district was originally designed as a concession to the Justice

Department's max-black policy. After being presented with a proposed map of the Eleventh District, "[t]he initial response in our office was that's ridiculous." "It was said that it doesn't make any sense and I said maybe not, but . . . we may get in trouble with the Justice Department if we don't draw [it] . . . like that and I think that was . . . the main reason" it was originally drawn. Tr. 431–432 (Oct. 30, 1995). Ms. Meggers referred to an "understanding" between the leadership in the legislature and the black caucus that a second majority-black district would be created. *Id.*, at 431. The testimony of several legislators indicated that any such understanding was arrived at in the shadow of the Justice Department's max-black goal, and that all other policies were to give way to this racial consideration. Robert Hanner, chairman of the House Reapportionment Committee, so indicated in his testimony. *Id.*, at 74–75. Sonny Dixon, a member of the House Reapportionment Committee, confirmed this account and said legislators felt pressure from the Justice Department in 1990 to create all possible majority-black districts. *Id.*, at 81. Thomas Murphy, Speaker of the Georgia House of Representatives in 1990 and now, said in his deposition that the initial 1991 reapportionment plan was based on "what we at least perceived to be the direction and instructions of the Justice Department." Deposition of Thomas B. Murphy, Record 22–23; see also *id.*, at 4, 6. This evidence all refers to development of the original 1991 legislative plan, not the 1992 precleared plan, and thus undermines the contention that the legislature's original plan should have been controlling on the District Court.

There is strong support, then, for finding the second majority-black district in Georgia's 1991 unprecleared plan resulted in substantial part from the Justice Department's policy of creating the maximum number of majority-black districts. It is not Justice Department interference *per se* that is the concern, but rather the fact that Justice Department pressure led the State to act based on an overriding concern with race. Given this background, it would have been most problematic for the trial court to insist on retaining a second majority-black district without regard to other, neutral districting factors. The trial court did not adopt this course. Instead, it gave careful consideration to creation of a second black district on grounds that a black voting population was one factor in drawing a district; and it concluded it could not draw the second majority-black district without allowing that one consideration to predominate over other traditional and neutral districting principles, principles which were a valid expression of legislative policy. There is ample basis in the record to support these conclusions. No other plan demonstrated a second majority-black district could be drawn while satisfying the constitutional requirement that race not predominate over traditional districting principles. The District Court said in its opinion that "[i]f Georgia had a concentrated minority population large enough to create a second majority-minority district without subverting traditional districting principles, the Court would have included one since Georgia's legislature probably would have done so." 922 F. Supp., at 1567, n. 16. The statements of several witnesses support the trial court's independent conclusion it was not possible to do so. Ms. Meggers testified that, unless race was the predominant motive, a second majority-black district could not be drawn in Georgia. Tr. 434–435 (Oct. 30, 1995). Speaker Murphy doubted "very seriously" a second majority-black district could be drawn in Georgia without violating the principles we laid down in *Miller.* Deposition, Oct. 26, 1995, Record 24.

The court found the 1991 unprecleared plan shared many of the constitutional defects of the precleared plan. Among other things, it connected the south DeKalb County urban black population with the mainly rural east Georgian minority population. 922 F. Supp., at 1563, n. 9. Indeed, the Eleventh District in the 1991 plan in many respects was almost the geographical monstrosity it became in the precleared plan. The ACLU plans were introduced at the remedial hearing by Selwyn Carter, an employee of the Atlanta-based private Southern Regional Council whose job was to draw and advocate reapportionment plans across the South. Mr. Carter said his "basic goal" in preparing the plans was "[t]o show that it is possible to draw a plan in which African American voters comprise approximately 50 percent of the voting age population of a district and at the same time show that race was not a factor." Tr. 296 (Oct. 30, 1995). The "least-change" plan, ACLU 1A, has numerous flaws. Besides its high population deviation, to be discussed, the Eleventh District has an iguana-like shape betraying the same invidious purpose we condemned in *Miller.* The only two plans close to the trial court's in terms of population deviation are Abrams A and the Justice Department's Illustrative Plan. Abrams A, with its three majority-black districts, splits nine counties in the Second District and three in the Eleventh, as well as numerous other counties in different parts of the State. The twisted shapes of its Second and Eleventh Districts again bear witness to racial motivation. The Illustrative Plan splits Bibb County—a county never before split in apportionment plans—to subsume Macon's black population. Although the Justice Department submitted the plan after the close of evidence, and in consequence its demographer could not be cross-examined on the question of racial motivation, the District Court recognized its apparent racial impetus. 922 F. Supp., at 1561, n. 4. Indeed, the Justice Department acknowledged a racial motivation at oral argument before the Court. Tr. of Oral Arg. 12, 16. The Justice Department also suggested it was proper to split Bibb County because the mayor and city council of Macon supported splitting the county and city into different districts. *Id.*, at 13. Macon's alleged urge to be segregated for congressional districting purposes, however, cannot vitiate the equal protection rights of the Eleventh District's objecting voters.

Interference by the Justice Department, leading the state legislature to act based on an overriding concern with race, disturbed any sound basis to defer to the 1991 unprecleared plan; the unconstitutional predominance of race in the provenance of the Second and Eleventh Districts of the 1992 precleared plan caused them to be improper departure points; and the proposals for either two or three majority-black districts in plans urged upon the trial court in the remedy phase were flawed by evidence of predominant racial motive in their design. In these circumstances, the trial court acted well within its discretion in deciding it could not draw two majority-black districts without itself engaging in racial gerrymandering.

II

The court-ordered plan is not violative of § 2 of the Voting Rights Act. We reject appellants' contrary position, which is premised on impermissible vote dilution in the court's failure to create a second majority-black district. Section 2 of the Voting Rights Act applies to any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . imposed or applied by any State or political subdivision . . . ." 42 U. S. C. § 1973(a). On its face, § 2 does not apply to a court-ordered remedial redistricting plan, but we will assume courts should comply with the section when exercising their equitable powers to redistrict. A violation of § 2 occurs if "it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of [a racial minority] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U. S. C. § 1973(b).

Our decision in *Thornburg* v. *Gingles,* 478 U. S. 30 (1986), set out the basic framework for establishing a vote dilution claim against at-large, multimember districts; we have since extended the framework to single-member districts. *Growe*

v. *Emison,* 507 U. S. 25, 40–41 (1993). Plaintiffs must show three threshold conditions: first, the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district"; second, the minority group is "politically cohesive"; and third, the majority "votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate." 478 U. S., at 50–51. Once plaintiffs establish these conditions, the court considers whether, "on the totality of circumstances," minorities have been denied an "equal opportunity" to "participate in the political process and to elect representatives of their choice." 42 U. S. C. § 1973(b).

The trial court found that to create a second majority-black district in Georgia would require subordinating Georgia's traditional districting policies and allowing race to predominate. 922 F. Supp., at 1566. We considered the determination in our discussion above and concluded it was well founded. If race is the predominant motive in creating districts, strict scrutiny applies, *Bush* v. *Vera,* 517 U. S. 952, 962 (1996), and the districting plan must be narrowly tailored to serve a compelling governmental interest in order to survive. We have assumed, without deciding, that compliance with § 2 can be a compelling state interest. See, *e. g., id.,* at 977; *Miller* v. *Johnson,* 515 U. S., at 921. Here, there was no "strong basis in evidence," *Shaw* v. *Reno,* 509 U. S., at 656 (internal quotation marks omitted), to conclude that vote dilution, in violation of § 2, would occur in consequence of the court's plan. In fact, none of the three *Gingles* factors, the threshold findings for a vote dilution claim, were established here. See *Bush, supra,* at 976–979.

Here the District Court found, without clear error, that the black population was not sufficiently compact for a second majority-black district. 922 F. Supp., at 1567. So the first of the *Gingles* factors is not satisfied. As we have noted before, § 2 does not require a State to create, on predominantly racial lines, a district that is not "reasonably compact." *Johnson* v. *De Grandy,* 512 U. S. 997, 1008 (1994). And the § 2 compactness inquiry should take into account "traditional districting principles such as maintaining communities of interest and traditional boundaries." *Bush, supra,* at 977.

The trial court also found the second and third *Gingles* factors—the extent of racially polarized voting—wanting. In the Eleventh District inquiry, the District Court found that § 2 did not justify drawing racial lines, and it discussed evidence of racial polarization at great length. The court found the statistical evidence was for the most part inconclusive and conflicting, but that the State's expert, Dr. Joseph Katz, was convincing in his refutation of Dr. Allan Lichtman, the United States' expert. 864 F. Supp., at 1388. The court found "a significant degree of crossover voting in Georgia and the Eleventh District," *id.,* at 1390, and that the record "fail[ed] to demonstrate . . . chronic bloc voting," *id.,* at 1392. The court found that the average percentage of whites voting for black candidates across Georgia ranged from 22% to 38%, and the average percentage of blacks voting for white candidates ranged from 20% to 23%. *Id.,* at 1390. As the court noted, "[b]lack and black-preferred candidates in Georgia have achieved many electoral victories in local and statewide elections and have received significant—occasionally overwhelming—support from both black and white voters within the Eleventh Congressional District." *Id.,* at 1390–1391. The results of the 1992 Democratic primary in the Eleventh District suggested to the court "a general willingness of white voters to vote for black candidates": black candidates in that primary received about 55% of the white vote, and Cynthia McKinney, a black, won the runoff against a white with 23% of the white vote. *Id.,* at 1391.

For the inquiry concerning the Second District and the remedy, appellants relied exclusively on the Eleventh District trial record. After the remedy hearing, the District Court reaffirmed its earlier findings and cited additional evidence of crossover voting. 922 F. Supp., at 1567. At the hearing concerning the Second District, Ms. Meggers stated that election results in the district indicated significant white crossover voting, and Representative Sanford Bishop, the black congressman elected in the Second District, agreed. Tr. 438, 142 (Oct. 30, 1995).

Appellants take issue with the District Court's assessment of the level of white crossover voting, but argue that, in any event, the level of polarization the District Court found is sufficient to satisfy the *Gingles* threshold. Under the circumstances, we cannot say the District Court clearly erred in finding insufficient racial polarization in voting to meet the *Gingles* requirements. The results of the 1996 general elections tend to support the District Court's earlier finding of "a general willingness of white voters to vote for black candidates." 864 F. Supp., at 1391. All three black incumbents won elections under the court plan, two in majority-white districts running against white candidates. (In *Gingles,* the Court indicated that incumbency is a "special circumstanc[e]" to be taken into account in evaluating racial bloc voting. 478 U. S., at 57. And in this action, the black candidates' success in two majority-white districts, quite different from their previous districts, is testimony to the "general willingness" of whites to vote for blacks.) These results also underscore the weakness of the Justice Department's methodology of calculating the likelihood of a black-preferred candidate winning based on strict racial percentages. Brief for United States 27, and n. 18. The Justice Department predicted that a black-preferred candidate "would likely be foreclosed from winning" in the court plan's Tenth District, and that "[t]he same result would follow even more clearly" in the court's Fourth District, which had a black voting age population of 33%. *Id.*, at 27. In fact, Representative McKinney won in the Fourth District.

Appellants argue the District Court's findings on § 2 are inconsistent and not owed deference, since the court held § 2 required maintenance of the majority-black Fifth District but not creation of a new majority-black district. The District Court found the black population in the Fifth District "is sufficiently compact and, being an urban minority population, has a sufficiently strong community of interest to warrant being a majority-minority district." 922 F. Supp., at 1568. The court also said the probability of electing a candidate is below 50% when the percentage of black registered voters is 50%, *ibid.*, and therefore the percentage of black registered voters should be kept as close to 55% as possible in the Fifth District. (The District Court noted, however, that it was uncomfortable using percentages of registered voters rather than voting age population, since "that in essence condones voter apathy." *Id.*, at 1568, n. 18.) The court made no explicit findings about differences in the racial polarization of voting between the Fifth and Eleventh Districts.

We do not agree that the District Court's maintenance of the Fifth District as a majority-black district under § 2 indicates its § 2 findings in reference to other districts are conflicting and not entitled to deference. The District Court noted that maintenance of a majority-black district in the Atlanta area—created in 1972 for compliance with the Voting Rights Act—had become a state districting policy. *Id.*, at 1565. Further, it is possible, although we do not express any opinion on the subject, that changing the racial majority of the district would have violated § 5 retrogression principles.

Private appellants also argue no deference is due the District Court's § 2 finding both because the court did not hold a separate hearing on whether its remedial plan violated § 2 and because it barred private intervention to defend the constitutionality of the Second District. We do not agree. First, neither our precedents nor the Act require the court to hold a separate hearing on the adequacy under § 2 of a remedial plan. Second, the private defendant-intervenors had ample opportunity to present evidence of the need for a second majority-black district under §2 at the remedy hearing, in which they fully participated. The finding that appellants have not shown the threshold *Gingles* factors for a §2 violation is owed deference, and we find it not clearly erroneous.

III

The private appellants contend the District Court's plan also violates §5 of the Voting Rights Act. Although the Justice Department did not include this claim in its jurisdictional statement, it agrees with private appellants and briefed the issue.

As we noted above, §5 requires covered jurisdictions to obtain either administrative preclearance by the Attorney General or approval from the United States District Court for the District of Columbia for any change in a "standard, practice, or procedure with respect to voting," and requires that the proposed change "not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U. S. C. §1973c. We have explained that "the purpose of §5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States*, 425 U. S. 130, 141 (1976).

The question arises whether a court decree is subject to §5. We have held that "[a] decree of the United States District Court is not within reach of Section 5 of the Voting Rights Act" such that it must be precleared. *Connor* v. *Johnson*, 402 U. S. 690, 691 (1971) *(per curiam)*. The exception applies to judicial plans, devised by the court itself, not to plans submitted to the court by the legislature of a covered jurisdiction in response to a determination of unconstitutionality. *McDaniel* v. *Sanchez*, 452 U. S. 130, 148–152 (1981). Here, the District Court made clear it had devised its own plan, a proposition not in dispute. In *Sanchez*, we emphasized language in a Senate Committee Report saying that, although preclearance does not apply to court-devised plans, "'in fashioning the plan, the court should follow the appropriate Section 5 standards, including the body of administrative and judicial precedents developed in Section 5 cases.'" *Id.*, at 149 (quoting S. Rep. No. 94–295, p. 19 (1975)). This is a reasonable standard, at the very least as an equitable factor to take into account, if not as a statutory mandate.

Appellants, however, have some difficulty fixing on a benchmark against which to measure any retrogression. Private appellants say the benchmark should be either the State's initial 1991 plan, containing two majority-black districts, or the State's "policy and goal of creating two majority black districts." Brief for Appellants 48. The Justice Department, for its part, contends the proper benchmark is the 1992 precleared plan, altered to cure its constitutional defects.

Here, as we have noted above in our discussions of both *Upham* and § 2, appellants have not demonstrated it was possible to create a second majority-black district within constitutional bounds. So, even were we to accept one of their proposed benchmarks, their desired remedy would be unconstitutional. As it happens, none of appellants' proposed benchmarks is appropriate. The private appellants' first proposal was not in effect in Georgia because it was refused preclearance. It thus could not operate as a benchmark under the Attorney General's regulations:

> "In determining whether a submitted change is retrogressive the Attorney General will normally compare the submitted change to the voting practice or procedure in effect at the time of the submission. If the existing practice or procedure upon submission was not in effect on the jurisdiction's applicable date for coverage . . . and is not otherwise legally enforceable under section 5, it cannot serve as a benchmark, and . . . the

> comparison shall be with the last legally enforceable practice or procedure used by the jurisdiction." 28 CFR § 51.54(b)(1) (1996).

See also *Holder* v. *Hall,* 512 U. S. 874, 883–884 (1994) ("Under § 5, then, the proposed voting practice is measured against the existing voting practice . . . . The baseline for comparison is present by definition; it is the existing status. . . . [T]here is little difficulty in discerning the two voting practices to compare to determine whether retrogression would occur"); *Reno* v. *Bossier Parish School Board,* 520 U. S. 471, 478 (1997). There are sound reasons for requiring benchmarks to be plans that have been in effect; otherwise a myriad of benchmarks would be proposed in every case, with attendant confusion. This rule is all the more appropriate when one considers the attempt to use as a benchmark the State's supposed policy of creating two majority-black districts. And the Justice Department's proposed benchmark—the 1992 plan shorn of its constitutional defects—was also never in effect. Nor can the 1992 plan, constitutional defects and all, be the benchmark. Section 5 cannot be used to freeze in place the very aspects of a plan found unconstitutional.

The appropriate benchmark is, in fact, what the District Court concluded it would be: the 1982 plan, in effect for a decade. 922 F. Supp., at 1569, n. 20. Appellants have not shown that black voters in any particular district suffered a retrogression in their voting strength under the court plan measured against the 1982 plan. Absent such proof, there is no violation of § 5. We reject appellants' assertion that, even using the 1982 plan as a benchmark, the court's plan is retrogressive. They claim that under the 1982 plan 1 of the 10 districts (10%) was majority black, while under the District Court's plan 1 of 11 districts (9%) is majority black, and therefore blacks do not have the same electoral opportunities under the District Court's plan. Under that logic, each time a State with a majority-minority district was allowed to add one new district because of population growth, it would have to be majority-minority. This the Voting Rights Act does not require.

IV

Finally, appellants contend the District Court's plan violates the constitutional guarantee of one person, one vote under Article I, § 2. This provision requires congressional districts to achieve population equality "as nearly as is practicable." *Wesberry* v. *Sanders,* 376 U. S. 1, 7–8 (1964). Court-ordered districts are held to higher standards of population equality than legislative ones. A court-ordered plan should "ordinarily achieve the goal of population equality with little more than *de minimis* variation." *Chapman* v. *Meier,* 420 U. S. 1, 26–27 (1975); *Connor* v. *Finch,* 431 U. S. 407, 414 (1977) (same). Here the District Court was not designing districts to remedy a one-person, one-vote violation, but courts should keep in mind that "absolute population equality [is] the paramount objective." *Karcher* v. *Daggett,* 462 U. S. 725, 732 (1983). Slight deviations are allowed under certain circumstances. *Chapman, supra,* at 26 ("With a court plan, any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features"); *Connor, supra,* at 419–420 (same); *Karcher, supra,* at 740 ("Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent[s]").

To help in interpreting what follows, we explain a few terms. Overall population deviation is the difference in population between the two districts with the greatest disparity. Average population deviation is the average of all districts' deviation from perfect one-person, one-vote allocation. If population allocation in Georgia were perfect, each district would have 588,928 people, according to 1990 census data.

Here, the District Court plan has an overall population deviation of 0.35%, and an average deviation of 0.11%. The plan has a lower deviation than: the 1992 plan (with its 0.93% overall deviation and its 0.35% average deviation); the 1982 plan; or "any other plan presented to the Court which was not otherwise constitutionally defective." 922 F. Supp., at 1561. Private appellants and *amici* in fact proposed plans with much higher deviations. ACLU 1A, the "least change" plan, had an overall population deviation of 0.94%; Abrams C had an overall deviation of 0.99%; and the Lewis-Gingrich Amici-R plan came in last place with an overall deviation of 1.86%. The only plans with lower overall deviations than the court's plan were the Justice Department's Illustrative Plan (0.19%) and the ACLU's Abrams A (0.29%), whose constitutional infirmities are discussed above.

The District Court recited in detail those state policies and conditions which support the plan's slight deviations. The court explained Georgia's "strong historical preference" for not splitting counties outside the Atlanta area, 922 F. Supp., at 1561, and for not splitting precincts, *id.*, at 1562. (The court observed that some splitting of precincts was unavoidable in Cobb County because of noncontiguous annexation patterns, and that it had split some precincts in Clayton County to achieve lower population deviations. *Id.*, at 1562, n. 6.) The court acknowledged that maintaining political subdivisions alone was not enough to justify less than perfect deviation in a court plan. See, *e. g., Kirkpatrick* v. *Preisler,* 394 U. S. 526, 533–534 (1969) ("[W]e do not find legally acceptable the argument that variances are justified if they necessarily result from a State's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries"). The District Court, in conformance with this standard, considered splitting counties outside the Atlanta area, but found other factors "unique to Georgia" weighed against it. See *Chapman, supra,* at 26. These included maintaining core districts and communities of interest. Georgia has an unusually high number of counties: 159, the greatest number of any State in the Union apart from the much-larger Texas. These small counties represent communities of interest to a much greater degree than is common, and we agree with the District Court that "such a proliferation" provides "ample building blocks for acceptable voting districts without chopping any of those blocks in half." 864 F. Supp., at 1377.

In any case, even if we had found the court plan's population deviation unacceptable, the solution would not be adoption of the constitutionally infirm, because race-based, plans of appellants. Indeed, before this Court at oral argument private appellants acknowledged the remedy for any one-person, one-vote violation would not be creation of a second majority-black district. Tr. of Oral Arg. 28–29. Rather, we would require some very minor changes in the court's plan—a few shiftings of precincts—to even out districts with the greatest deviations.

That exercise, however, and appellant's objections to the court plan's slight population deviations, are increasingly futile. We are now more than six years from the last census, on which appellants' data is based. The difference between the court plan's average deviation (0.11%) and the Illustrative Plan's (0.07%) is 0.04%, which represents 328 people out of a perfect district population of 588,928. The population of Georgia has not stood still. Georgia is one of the fastest-growing States, and continues to undergo population shifts and changes. U. S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States 29 (1996) (Table 28) (showing Georgia tied for seventh place among the States in percentage of population growth from 1990 to 1995, with 11.2% growth). In light of these changes, the tinkerings appellants propose would not reflect Georgia's true population distribution in any event. The *Karcher* Court, in explaining the absolute equality standard, acknowledged that "census data are not perfect," and that "population counts for particular localities are outdated long before they are completed." 462 U. S., at 732. *Karcher* was written only two years from the previous census, however, and we are now more than six years from one. The magnitude of population shifts since the census is far greater here than was likely to be so in *Karcher.* These equitable considerations disfavor requiring yet another reapportionment to correct the deviation.

V

The task of redistricting is best left to state legislatures, elected by the people and as capable as the courts, if not more so, in balancing the myriad factors and traditions in legitimate districting policies. Here, the legislative process was first distorted and then unable to reach a solution. The District Court was left to embark on a delicate task with limited legislative guidance. The court was careful to take into account traditional state districting factors, and it remained sensitive to the constitutional requirement of equal protection of the laws.

* * *

The judgment of the District Court is affirmed.

It is so ordered.

[Appendix to opinion of the Court follows this page.]

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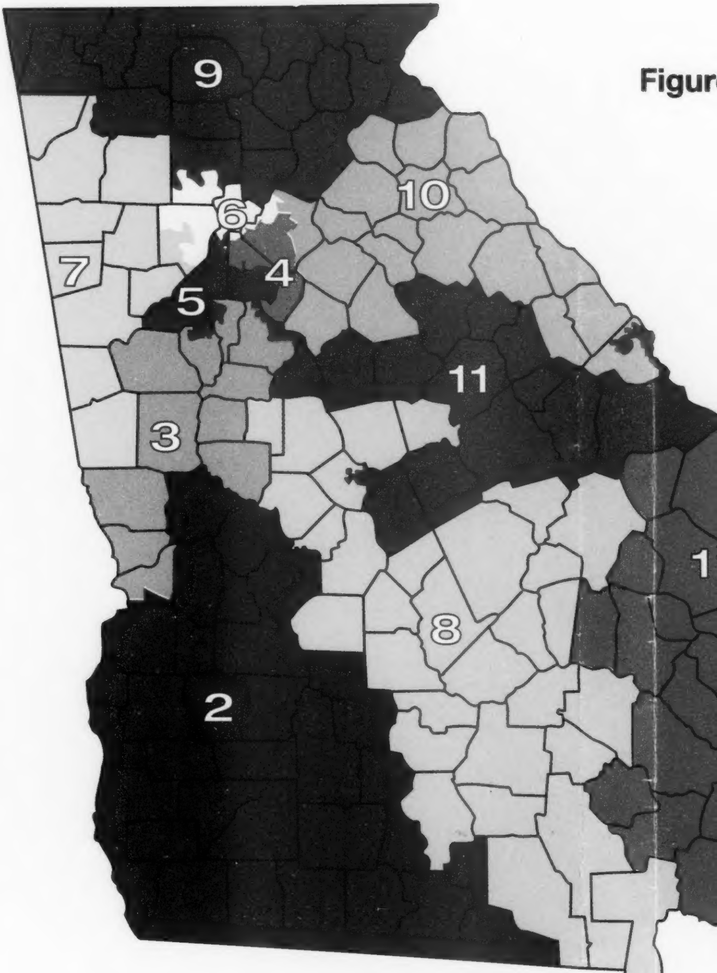
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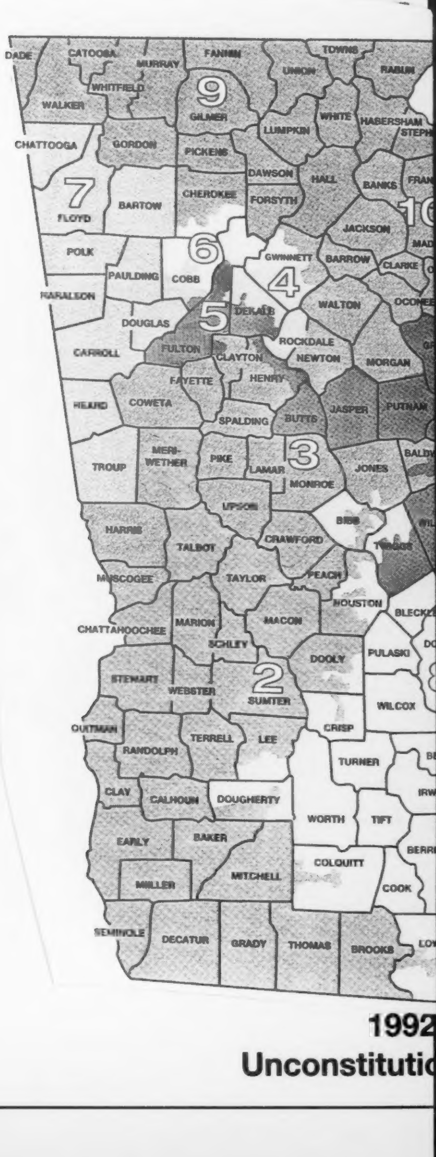
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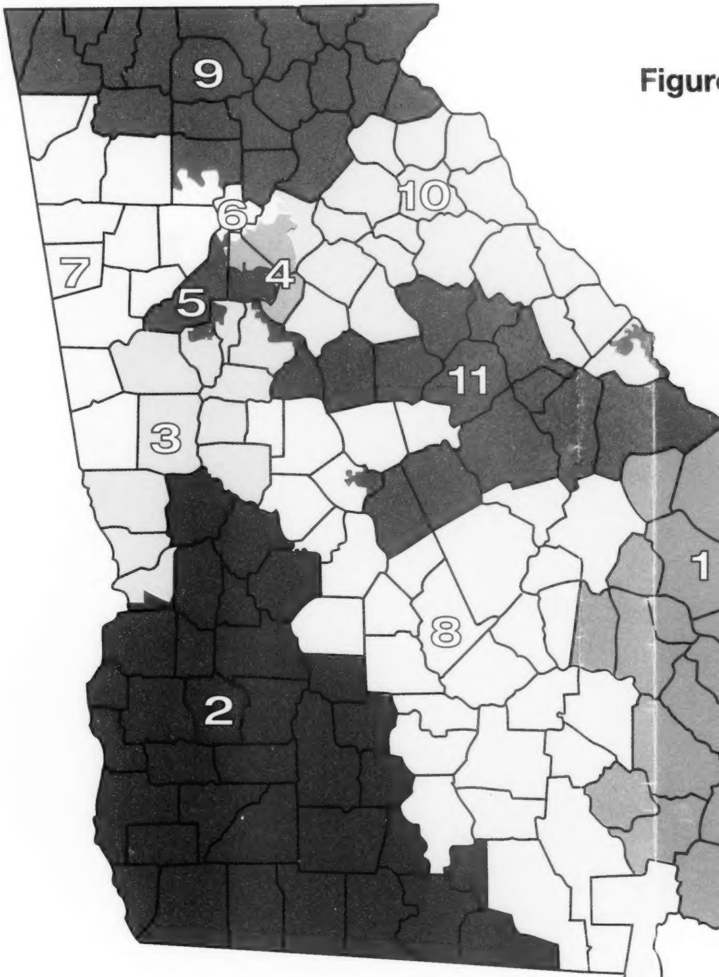
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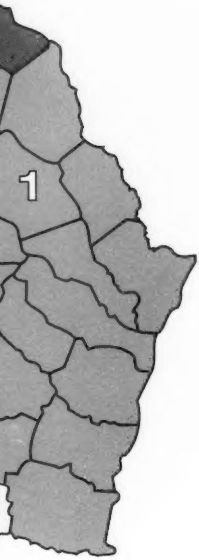

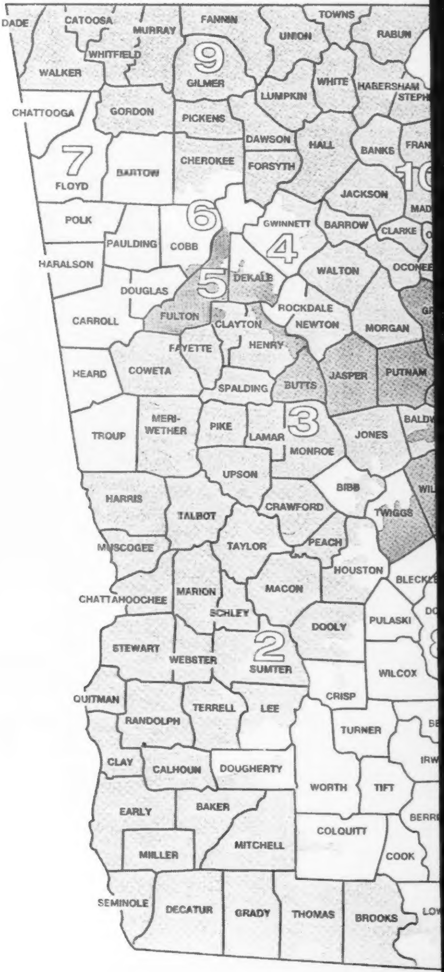
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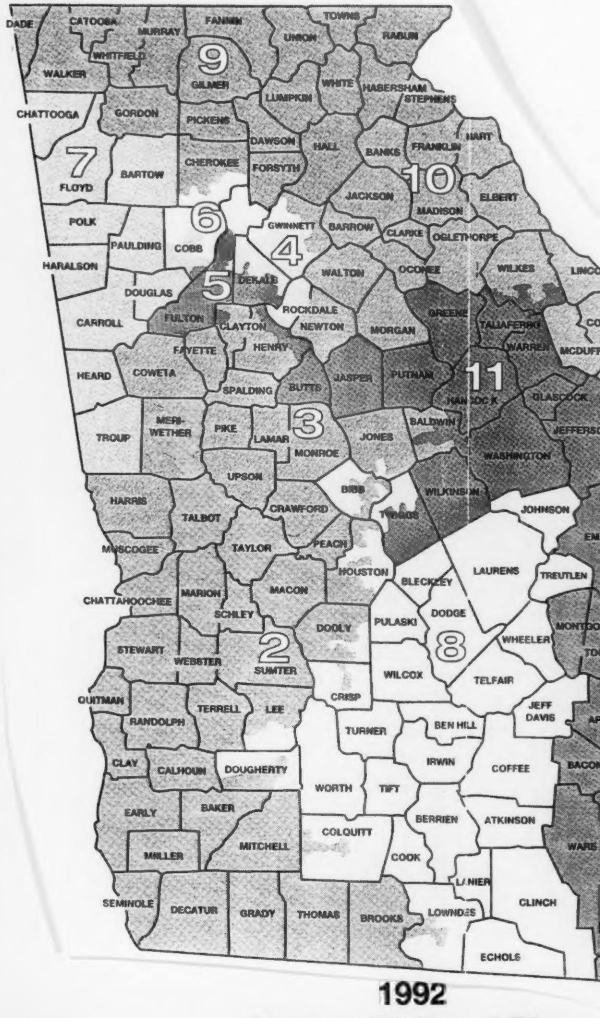
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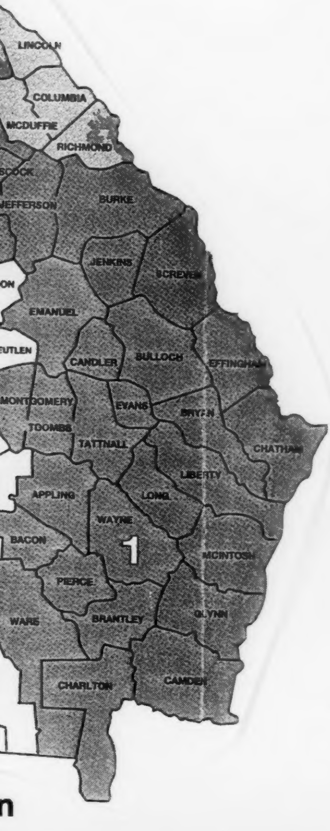
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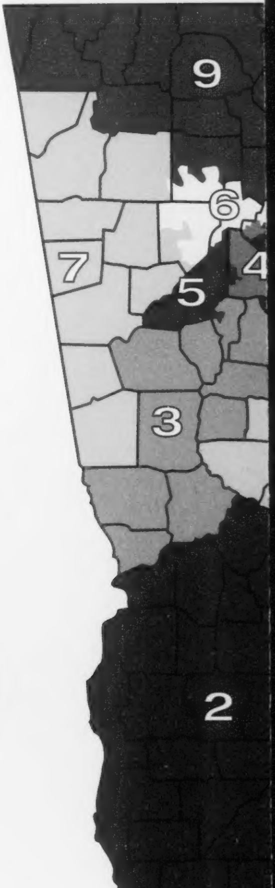

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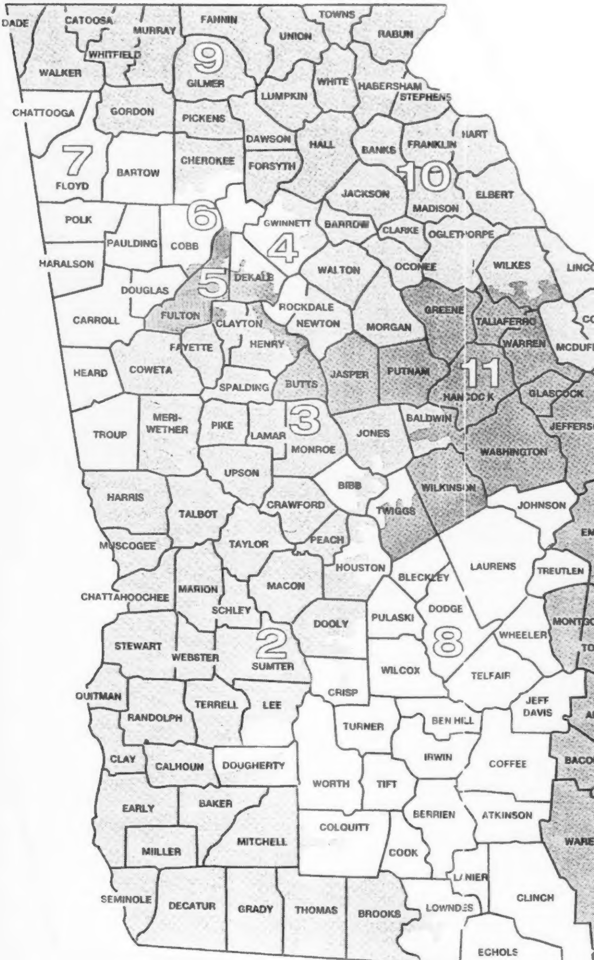
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1992

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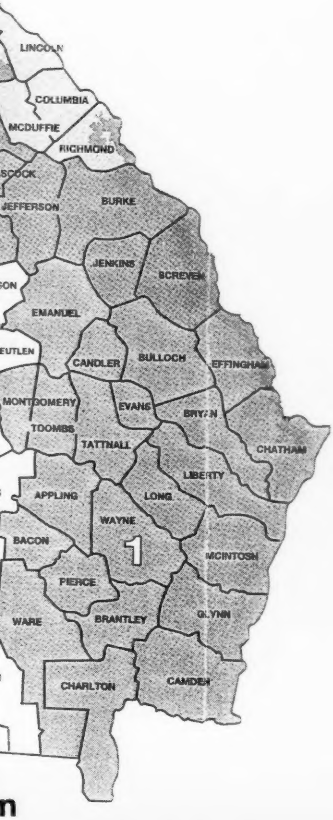
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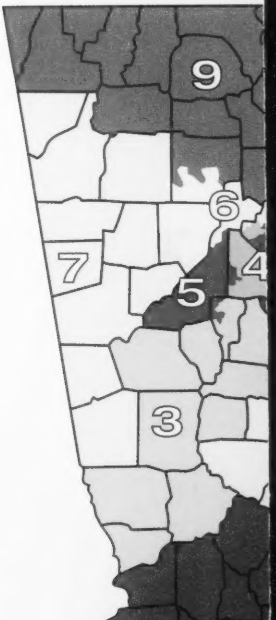

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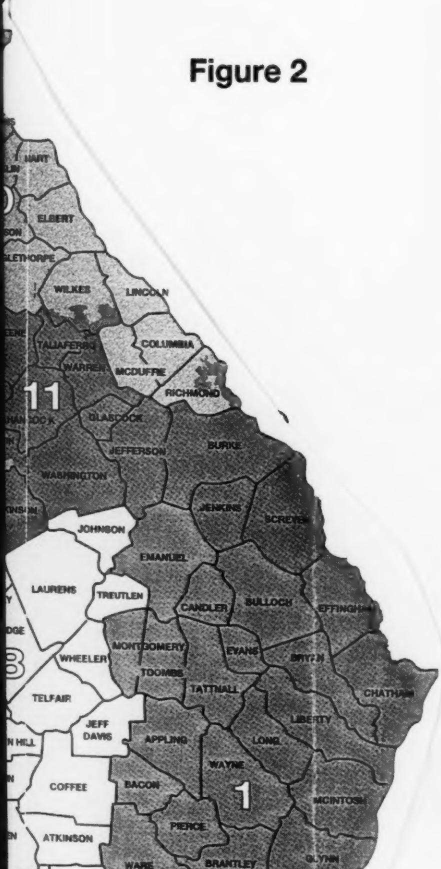
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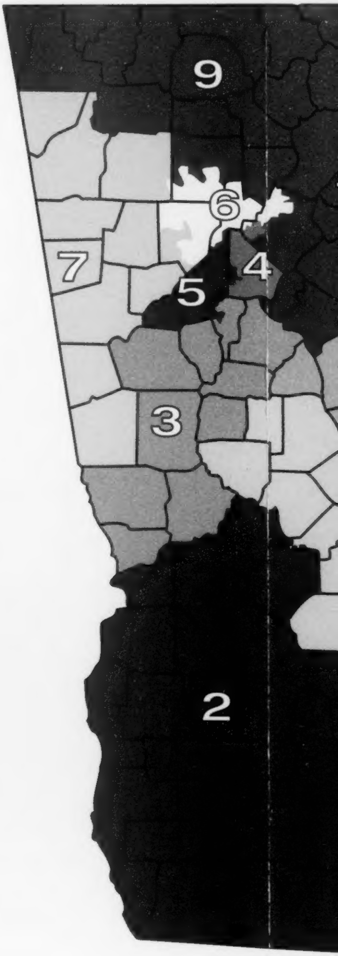

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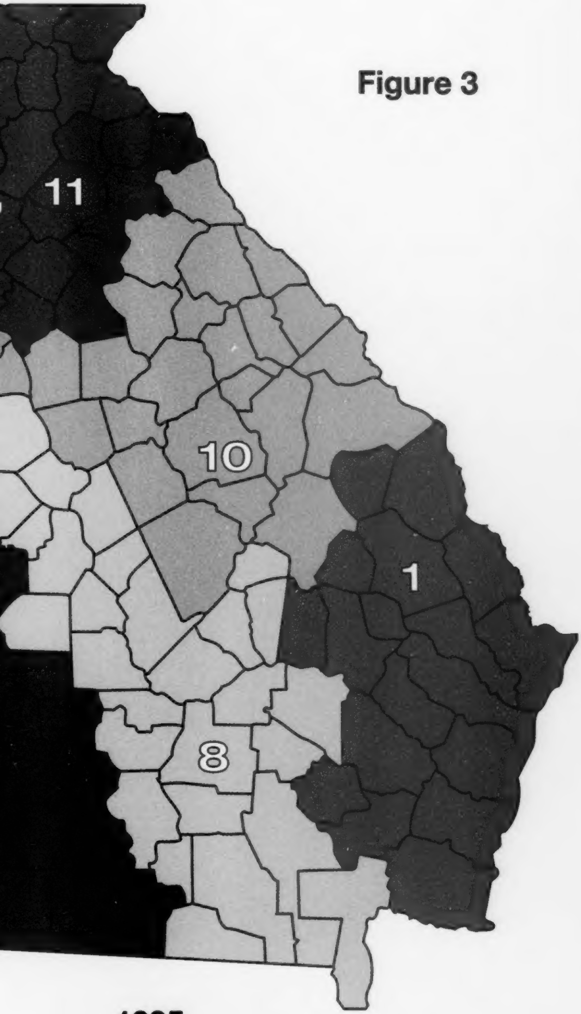

1995
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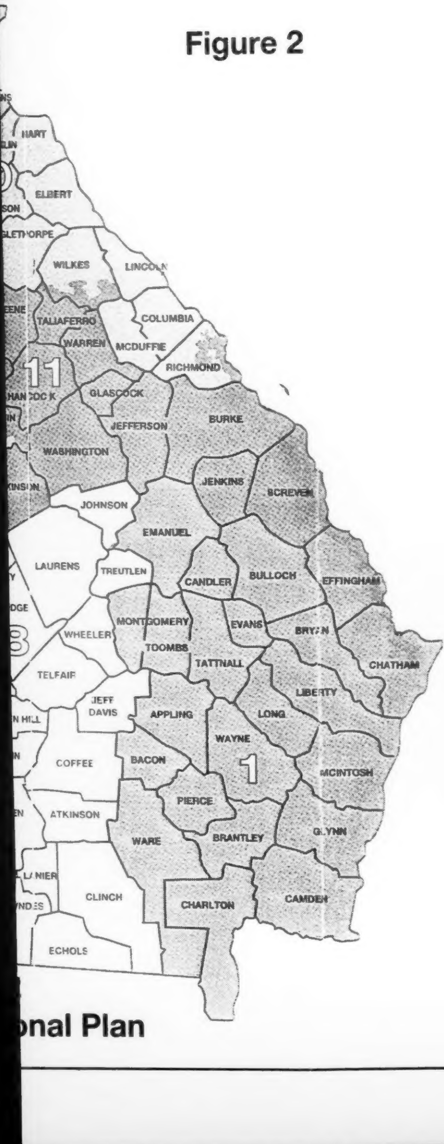

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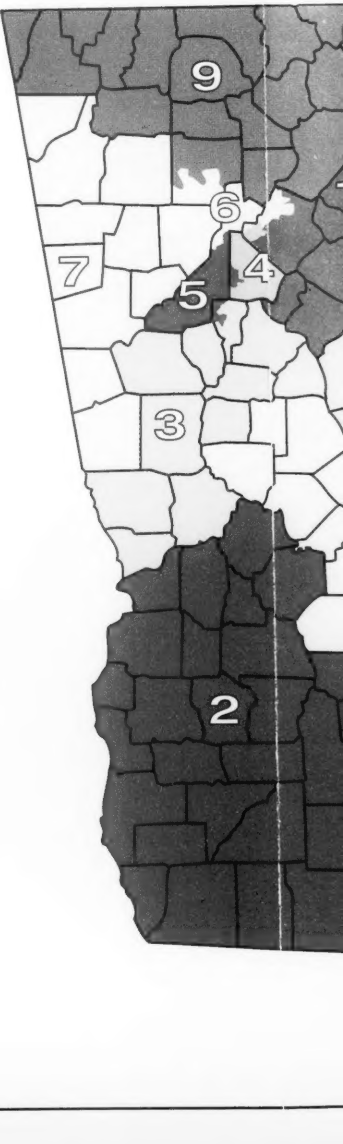

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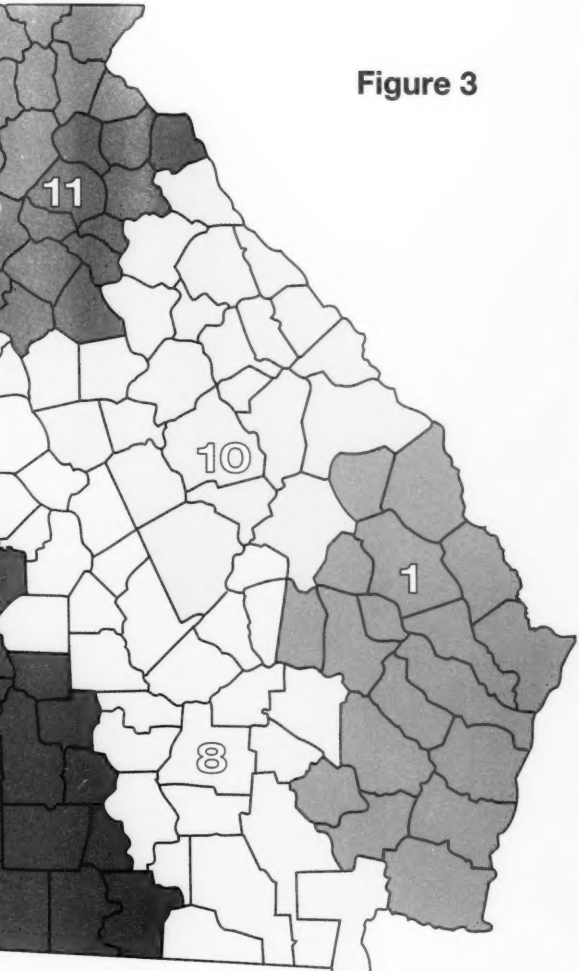


1995
Court Plan

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

Georgia elects 11 Members of the United States House of Representatives. Georgia's African-American voting age population is just over 1.7 million, or about 27 percent of a total voting age population of about 6.5 million. See *Miller* v. *Johnson,* 515 U. S. 900, 906 (1995). In 1992 Georgia's Legislature redrew congressional district boundaries so as to create an African-American voting age majority in 3 of 11 districts. This Court held that three-district plan unconstitutional. *Id.*, at 928. On remand, the District Court, *inter alia,* drew up a new redistricting plan with *one* majority-minority district. *Johnson* v. *Miller,* 922 F. Supp. 1556, 1560–1561 (SD Ga. 1995). The basic legal issue before us now is whether the District Court should have retained (not one but) *two* majority-minority districts.

The majority holds that the District Court could lawfully create a new districting plan that retained only one such district. But in my view that decision departs dramatically from the Georgia Legislature's preference for two such districts—a preference embodied in the legislature's earlier congressional district plans. A two-district plan is not unconstitutional. And the District Court here, like the District Court in *Upham* v. *Seamon,* 456 U. S. 37, 43 (1982) *(per curiam),* "was not free . . . to disregard the political program of the . . . Legislature." For that reason, and others, I dissent.

I

The majority fully understands the relevance, and the importance, here of this Court's *Upham* decision. In *Upham* the Court said:

> "'Just as a federal district court . . . should follow the policies and preferences of the State, as expressed . . . in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution,

> . . . a district court should similarly honor state policies in the context of congressional reapportionment.'" *Id.*, at 41 (quoting *White* v. *Weiser*, 412 U. S. 783, 794–795 (1973)).

The majority here, referring to this language, agrees:

> "[A] court, as a general rule, should be guided by the legislative policies underlying the existing plan, to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act." *Ante*, at 79 (citing *Upham, supra*, at 43).

It is therefore common ground among us that the District Court should have drawn boundaries so as to leave two majority-minority districts rather than one—*unless* there was no such state policy or preference; *unless* the creation of two such districts would have violated the Constitution or the Voting Rights Act of 1965; or *unless* doing so simply would have proved impractical in light of other important districting objectives. See *Upham, supra*, at 41–42 (quoting *White, supra*, at 794–795). Unlike the majority, I cannot find present here any of these three countervailing justifications.

A

No one denies that, if one looks at the redistricting plans proposed by the Georgia Legislature, one will find in them expressions of state "'policies and preferences'" for two majority-minority districts. 456 U. S., at 41; see also Appendix to this opinion (Appendix), 1991 Plan, *infra*. After the 1990 Census, which increased the size of Georgia's congressional delegation from 10 to 11, App. in *Miller* v. *Johnson*, O. T. 1994, No. 94–631, p. 9, the state legislature began a lengthy political process of redistricting and considered the majority-minority district issue, among others. *Id.*, at 10–14; see also Deposition of Linda Meggers, Record 11–17, 20–22, 32–33, 85 (May 6, 1994). The legislature proposed one plan in 1991 with two such districts. See Appendix, 1991 Plan, *infra.* When the United States Department of Justice (DOJ or Justice Department) denied preclearance under § 5 of the Voting Rights Act of 1965 (VRA), 42 U. S. C. § 1973, the legislature proposed a second plan, which also contained two such districts. Subsequently the legislature proposed a third plan with three such districts—a plan approved by the Justice Department but struck down by this Court in *Miller, supra.*

What the District Court and the majority deny is that the "preferences" expressed in these three redistricting plans reflect the Georgia Legislature's *true* preference. The District Court said that "Georgia's current plan was not the product of Georgia's legislative will," but rather "was tainted by unconstitutional DOJ interference" into the "process" that produced the plan. 922 F. Supp., at 1560. The majority repeats the District Court's comment about DOJ's "thorough 'subversion of the redistricting process' since the 1990 census," *ante,* at 84, adds that the "State was predominantly driven" by "steady Justice Department pressure," *ante,* at 86, and concludes:

> "Interference by the Justice Department . . . disturbed any sound basis to defer to the 1991 unprecleared plan . . . ." *Ante,* at 90.

I believe, however, that the majority's conclusion—its reason for refusing to recognize the Georgia Legislature's two-district preference—is wrong both as a matter of fact and as a matter of law.

The conclusion is factually inadequate because the testimony cited, *ante,* at 86–87, to show unusual DOJ pressure in the 1991 redistricting process shows nothing unusual. It shows only that the Justice Department told Georgia that it must comply with the VRA, which statement Georgia legislators might have considered an exhortation to create more than one majority-minority district. Tr. 16 (Apr. 18, 1994); *id.,* at 431–433 (Oct. 30, 1995); Deposition of Linda Meggers, *supra,* at 20. Indeed, the record indicates that a number of Georgia legislators affirmatively wanted two majority-minority districts. Tr. 431–432 (Oct. 30, 1995); Deposition of Linda Meggers, *supra,* at 22, 32. It also shows that the 1991 two-district plan was the result of an " 'understanding' between the leadership in the legislature and the black caucus." *Ante,* at 87; see also Tr. 32 (Apr. 18, 1994); *id.,* at 431–432 (Oct. 30, 1995); Deposition of Linda Meggers, *supra,* at 22, 32; that the 1991 "two district" plan (as the State conceded) "was not perceived as a 'racial gerrymander,' " *ante,* at 86 (quoting Brief for Appellants Miller et al. in *Miller* v. *Johnson,* O. T. 1994, No. 94–631, p. 49); and that the 1991 "two district" plan (as the District Court found), "like most redistricting efforts, was the culmination of committee meetings, public hearings, examination of various districting proposals, and many hours spent with an extremely sophisticated computer." *Johnson* v. *Miller,* 864 F. Supp. 1354, 1363 (1994). Indeed, much of the departmental "interference" to which the majority refers took place *after adoption* of the 1991 plan, see *ante,* at 80; Tr. 21, 39–40, 43, 75 (Oct. 30, 1995); Deposition of Linda Meggers, *supra,* at 79–80; *Miller,* 515 U. S., at 906–907; App. in No. 94–641, p. 16, and likely reflected departmental concern related to Georgia's voting discrimination history. See *Busbee* v. *Smith,* 549 F. Supp. 494, 500, aff'd, 459 U. S. 1166 (1982); App. 139–140.

The majority is legally wrong because this Court has said that a court should determine a State's redistricting preferences by looking to the " 'plans proposed by the state legislature,' " *Upham,* 456 U. S., at 41 (quoting *White,* 412 U. S., at 794–795), not by evaluating the various political pressures that might have led individual legislators to vote one way rather than another (or, for that matter, by reviewing after-the-fact testimony regarding legislative intent). Cf. *Upham, supra,* at 41; *White, supra,* at 794–795; see also *Karcher* v. *Daggett,* 462 U. S. 725, 740 (1983). " 'Districting plans,' " like other legislative Acts, " 'are integrated bundles of compromises, deals, and principles.'" *Bush* v. *Vera,* 517 U. S. 952, 1059 (1996) (SOUTER, J., dissenting) (quoting Pildes & Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after *Shaw* v. *Reno,* 92 Mich. L. Rev. 483, 585–586 (1993)). District plans, like other legislative Acts, may reflect not only reasoned argument but also political pressures, brought to bear by many different individuals and groups using subtle or unsubtle suggestions, promises, or threats of votes, support, publicity, and even lawsuits.

How can a court say that a legislative Act is legitimate—that it reflects legislative preferences or policies—when those who reason or cajole (or threaten suit) are farmers, businessmen, or consumer groups, but that the same legislative Act becomes illegitimate—that it does not reflect "true" legislative policy or preference—simply because those who seek to persuade (or threaten suit) represent the Justice Department. One cannot say that the Justice Department's power is any less legitimate than that exercised by the many other groups that seek to influence legislative decisions; and its employees' sworn duty to uphold the law would seem more suitably characterized as a reason for paying greater attention to its views rather than as a reason for heeding them less. Regardless, I am not aware of any legal principle that supports the kind of distinction (among legislative pressures) that the District Court made; and the District Court's necessary reliance upon such a distinction, by itself, should warrant vacating the District Court's decision.

Moreover, what reason is there to believe that Georgia's Legislature did not "really" want the two majority-minority districts that its earlier plans created? There is—as I indicated earlier—evidence that a number of legislators *did* want two majority-minority districts. See *supra,* at 106. And the legislature was aware of Georgia's long, well-documented history of past discrimination in voting. See *Busbee, supra; Rogers* v. *Lodge,* 458 U. S. 613 (1982); *Gray* v.

Sanders, 372 U. S. 368 (1963); see also *Morris* v. *Fortson,* 261 F. Supp. 538, 541 (ND Ga. 1966); *Lodge* v. *Buxton,* 639 F. 2d 1358, 1378 (CA5 1981) (racial bloc voting in Burke County); *Carrollton Branch of NAACP* v. *Stallings,* 829 F. 2d 1547, 1559 (CA11 1987) (racial bloc voting in Carroll County); *Cross* v. *Baxter,* 604 F. 2d 875, 880, n. 8 (CA5 1979); *Paige* v. *Gray,* 437 F. Supp. 137, 158 (MD Ga. 1977) (Albany, Ga.); *Pitts* v. *Busbee,* 395 F. Supp. 35, 40 (ND Ga. 1975) (Fulton County); *Bailey* v. *Vining,* 514 F. Supp. 452, 461 (MD Ga. 1981) (Putnam County); *Wilkes County* v. *United States,* 450 F. Supp. 1171, 1174 (DC 1978); see generally E. Foner, Reconstruction: America's Unfinished Revolution, 1863–1877, pp. 423–424 (1988); McDonald, Binford, & Johnson, Georgia, in Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965–1990, pp. 67–74 (C. Davidson & B. Grofman eds. 1994).

The Georgia Legislature was likely aware of the many unfortunate consequences that have flowed from this history. They include the facts that, when Congress first enacted the VRA, fewer than 30 percent of African-Americans eligible to vote in Georgia had registered to vote, *ibid.,* and that no African-American had represented Georgia in Congress since Reconstruction, App. 140, when Congressman Jefferson Franklin Long briefly represented the State. B. Ragsdale & J. Treese, Black Americans in Congress, 1870–1989, p. 81 (1990).

The Georgia Legislature also might have thought that some degree of (indeed, a less than proportionate amount of) majority-minority districting could help to overcome some of the problems these facts suggest. Forty-two members of Georgia's (180 member) House of Representatives themselves were elected from majority-black districts; 30 of those members are black, 12 are white. App. 116. One hundred thirty-eight members of Georgia's House were elected from majority-white districts; 1 of those members is black, 137 are white. *Ibid.* Forty-three members of Georgia's (56 member) Senate are elected from majority-white districts; all of those members are white. *Ibid.* Until 1972, Georgia had not elected any African-American Members of Congress since Reconstruction. 1 Reference Library of Black America 67 (K. Estell ed. 1994). Since then, it has elected a total of four. Sherman, Diluting Black Votes for a Stronger Voice; Politicians Debate Impact of Remap, Atlanta Journal-Constitution, Dec. 17, 1995, p. G3. Each of those Members originally represented a majority-minority district (although two of them were recently reelected as incumbents after boundary changes created white majorities in their districts). *Ante,* at 93.

These circumstances help to explain why the 1991 Georgia Legislature might have thought that the creation of two majority-minority districts would help overcome race-related barriers—barriers erected by history and prejudice, reinforced by inertia and nonparticipation. Not only the three-district plan, but also the 1991 plan and the first (unprecleared) 1992 plan suggest that that is what the legislature *did* think. And I can find no reason in the record *not* to take at face value what all the legislature's plans thereby suggest, namely, that two majority-minority districts represent a significant legislative "policy and preference."

B

The majority says that the legislature's two-district preference is not owed *Upham* deference because a plan that embodied that preference is (or would be) "flawed by evidence of predominant racial motive," *ante,* at 90, or based upon race to a degree not reasonably necessary to comply with §2 of the VRA, 42 U. S. C. §1973. The majority means that a two-district plan would be unlawful—that it would violate the Constitution as interpreted in *Miller.* I cannot agree.

Miller considered the constitutionality of a *three*-district plan. Its five-Justice majority included one Member who subsequently made clear that, even if racial considerations "predominate" in a State's drawing of a district boundary, that district is *nonetheless lawful* (because there is a compelling, hence redeeming, interest) if the State has "a strong basis in evidence for concluding" that the district would otherwise violate VRA § 2. *Bush,* 517 U. S., at 994 (O'CONNOR, J., concurring); see also *Miller,* 515 U. S., at 921; *Shaw* v. *Reno,* 509 U. S. 630, 656–657 (1993). That "'strong basis in evidence' need not take any particular form," *Bush,* 517 U. S., at 994 (O'CONNOR, J., concurring), and where it is present, the State "may create a majority-minority district without awaiting judicial findings," *ibid.;* see also *Wygant* v. *Jackson Bd. of Ed.,* 476 U. S. 267, 289–291 (1986) (O'CONNOR, J., concurring); *McDaniel* v. *Barresi,* 402 U. S. 39, 41 (1971). The majority does not reject this standard. *Ante,* at 90–91. And it cannot deny that there is a "strong basis in the evidence" for believing that, after the 1990 census, VRA § 2, § 5, or both, required the creation of a second majority-minority district.

As the majority agrees, § 2 requires a second majority-minority district here, if the "totality of [the] circumstances" suggests that racial minorities are excluded from "participat[ing] in the political process" and "elect[ing] representatives of their choice," 42 U. S. C. § 1973(b), and the evidence shows that (1) the minority group "is sufficiently large and geographically compact to constitute a majority" in a second "single-member district"; (2) the minority group is "politically cohesive"; and (3) the majority "votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Thornburg* v. *Gingles,* 478 U. S. 30, 50–51 (1986).

The majority discusses only these last *(Gingles)* requirements at any length. As to the first requirement—compactness—the plans before the District Court raised two possibilities: first, the creation of a majority-minority district in southwest Georgia—in approximately the area labeled District 2 in the court's plan (Appendix, 1995 Court Plan, *infra*); and second, the creation of the majority-minority district in southeastern central Georgia—in approximately the area labeled District 11 in the Justice Department's Illustrative Plan (Appendix, Illustrative Plan, *infra*).

The first possibility could have involved a compactly shaped district. Regardless, the DOJ's Illustrative Plan (which the District Court considered on the merits, 922 F. Supp., at 1561, n. 4) suggests a newly drawn District 11 with an African-American population of 54.60 percent, an African-American voting age population of 51.04 percent, and a population deviation of 0.10. (This deviation percentage—the highest in the Illustrative Plan—was still lower than the deviation in two of the districts contained in the Court Plan.) It suggests that the District Court's statement that "the only way Georgia could create a majority-minority district out of the minority concentrations in east-central Georgia was to link" rural and urban communities by using "land bridges and appendages" similar to those used in the unconstitutional 1992 plan, 922 F. Supp., at 1566, n. 15, was erroneous. The proposed district is different from its unconstitutional predecessor. It does not try to build a land bridge linking southern Atlanta with Savannah. Cf. *Miller*, *supra*, at 908. And its boundaries are far more regular.

Moreover, it strikes me that the District Court's finding that a district in east-central Georgia that encompassed both rural and urban African-American communities could not be "compact" confuses a number of issues. *Shaw* v. *Reno* and *Miller* compactness, which concerns the shape or boundaries of a district, differs from §2 compactness, which concerns a minority group's compactness. Additionally, where (as here) the racial minority group is geographically compact, see Appendix, Illustrative Plan, *infra*, the fact that communities are rural or urban has more to do with political cohesiveness—whether communities share common interests—than with §2 compactness. To my knowledge, no case has ever held that rural and urban racial minorities *cannot* together create a compact minority for § 2 compactness purposes. Moreover, it seems clear that rural and urban African-American voters who live near each other *might* share important common interests; and I have found nothing in the record that suggests that the rural and urban black voters here, living near each other, do not share many common interests—in respect to many important legislative matters. See Karlan & Levinson, Why Voting Is Different, 84 Calif. L. Rev. 1201, 1216–1220 (1996); see also *Gingles*, *supra*, at 64 (citing Butler, Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote, 42 La. L. Rev. 851, 902 (1982), and S. Verba & N. Nie, Participation in America 151–152 (1972)).

The District Court considered the remaining two *Gingles* factors (the minority's "political cohesiveness" and the majority's "bloc voting") under a single rubric, which the majority calls "the extent of racially polarized voting." *Ante*, at 92. Of course, Georgia's history, including the political results that I have mentioned before—the fact that African-American representatives have come almost exclusively from majority-minority districts—strongly support the existence of that "polarization." Moreover, appellants produced experts who testified that the percentage of District 11 white voters willing to vote for a black candidate varied from 0 to 26 percent, while the number of black voters willing to vote for a white candidate varied from 3 to 11 percent. App. 54–61, 69–70, 72. Other expert testimony suggested less polarization (placing the relevant numbers at 22 to 38 percent white-for-black and 20 percent to 23 percent black-for-white). *Johnson* v. *Miller*, 864 F. Supp., at 1390. But that other testimony rested in considerable part on local (and judicial, and primary) election results with multiple candidates or other special features that discouraged racial bloc voting, and for that reason they may have overstated the significance of the numerical results. See App. 93–94; *Gingles*, 478 U. S., at 57, nn. 25 and 26.

Regardless, as the majority says, the District Court found the statistical evidence inconclusive and "conflicting." 922 F. Supp., at 1567. And the District Court conceded the existence of "some degree of vote polarization." *Ibid.* (It simply said that the "degree" was not "'alarming.'" *Ibid.*) That African-American incumbents were reelected does not, without more, disprove polarization. *Gingles, supra,* at 75 ("'[T]he election of a few minority candidates does not "necessarily foreclose the possibility of dilution of the black vote . . ."'") (quoting S. Rep. No. 97–417, p. 29, n. 115 (1982), in turn quoting *Zimmer* v. *McKeithen*, 485 F. 2d 1297, 1307 (CA5 1973) (en banc), aff'd *sub nom. East Carroll Parish School Bd.* v. *Marshall*, 424 U. S. 636 (1976) *(per curiam)*); 478 U. S., at 75 (citing S. Rep. No. 97–417, *supra,* at 29, n. 115) (listing incumbency as a special factor in assessing vote polarization).

The majority says that, despite this evidence, the District Court's findings—of no § 2 violation and no § 5 violation—are adequately supported. *Ante,* at 94, 97. But that is because the District Court asked the wrong question. We need not decide whether the evidence shows the failure to create a second majority-minority district violates § 2. Cf. *ante,* at 90–95. (Nor, for that matter, need we decide whether the consequent reduction of such districts from 1 in 10 to 1 in 11 would, other things being equal, violate § 5—which it might do. Cf. *ante,* at 95–98.) The question is not about whether the evidence proves § 2 *in fact requires* two majority-minority districts. The question is whether the evidence is strong enough to justify a legislature's reasonable belief that that was so. The record rather clearly demonstrates a "strong basis in the evidence" for *believing* that § 2 or § 5 required two majority-minority districts. The legislature thus could very reasonably have believed that was so. And, that is what I had believed the law, as set forth in this

Court's opinions, required as legal justification for a district that otherwise would violate the basic predominant factor test of *Miller*.

This legal distinction—between whether a plan really violates § 2 or might well violate § 2—may seem technical. But it is not. A legal rule that permits legislatures to take account of race only when § 2 *really* requires them to do so is a rule that shifts the power to redistrict from legislatures to federal courts (for only the latter can say what § 2 *really* requires). A rule that rests upon a reasonable view of the evidence (*i. e.*, that permits the legislature to use race if it has a *"strong basis" for believing* it necessary to do so) is a rule that leaves at least a modicum of discretionary (race-related) redistricting authority in the hands of legislators. Again (and at a minimum), the District Court's use of the wrong test requires vacating its judgment.

C

To create a second majority-minority district is not impractical nor would doing so significantly interfere with other important districting objectives. The easiest way to understand why this is so is to look at three plans that I have placed in the Appendix, *infra*. I shall call the Georgia Legislature's 1991 two-district reapportionment Plan A. Appendix, 1991 Plan, *infra*. I shall call the one-district plan adopted by the court Plan B. Appendix, 1995 Court Plan, *infra*. And I shall call the two-district Illustrative Plan proposed by the Justice Department Plan C. Appendix, Illustrative Plan, *infra*. Inspection of the three plans suggests that the District Court's plan (B) is very similar to the other two (A and C) but for one critical feature, namely, that it has one majority-minority district rather than two.

Now consider the three plans in respect to each of the five districting considerations that the District Court called traditional and important. They are: (a) retaining one district in each corner of the State; (b) creating an urban minority district; (c) maintaining political subdivisions; (d) protecting incumbents; and (e) maintaining traditional district cores. 922 F. Supp., at 1564–1565.

All three plans are identical in respect to the first two considerations. Each maintains districts in three of the four state corners; each creates at least one urban minority district. Plan B—the District Court's plan—is marginally superior in respect to the third criterion (maintaining political subdivisions). Plan B splits six counties within the Atlanta area but none outside the Atlanta area. *Id.*, at 1564. Plan C splits two counties (Bibb and Muscogee) outside the Atlanta area. (Appellants, however, advance nonracial justifications for the latter splits.)

Plan C is superior to Plan B in respect to the remaining two considerations. Plan C displaces no incumbents. Plan B displaces three incumbents (including two African-Americans). Plan C maintains all district cores. Plan B moves many more Georgians into new districts.

Plan C has certain other advantages: It maintains, as provided in the legislature's 1991 plan, 138 of Georgia's 159 counties. Plan B maintains 123. Plan C has greater population uniformity among its districts. And, of course, Plan C provides for two majority-minority districts—the number the legislature provided in two of its three redistricting plans.

I add one point. This is not a suit in which there are claims of interference with the right to cast a ballot or "dilution" of the majority's vote. Cf. *White* v. *Regester*, 412 U. S. 755 (1973); *Reynolds* v. *Sims*, 377 U. S. 533 (1964); and *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960); see also Karlan & Levinson, 84 Calif. L. Rev., at 1212–1216. Rather, the legislature's plans, insofar as they were race conscious, sought only to prevent what the legislature could reasonably have believed to be unlawful vote dilution—*i. e.*, to prevent a violation of VRA § 2, or perhaps § 5. See Tr. 103 (Oct. 30, 1995) (testimony of Rep. Sanford Bishop). Given this fact and given the three sets of considerations just mentioned, I do not see how the majority, consistently with *Upham,* can affirm the District Court's determination.

II

In other cases dissenting judges have expressed concerns that the Court's holdings and particularly its test—"predominant racial motive"—would prove unworkable, that they would improperly shift redistricting authority from legislatures to courts, and that they would prevent the legitimate use (among others the remedial use) of race as a political factor in redistricting, sometimes making unfair distinctions between racial minorities and others. See, *e. g., Shaw* v. *Reno,* 509 U. S., at 676–679 (STEVENS, J., dissenting); *id.,* at 679–687 (SOUTER, J., dissenting); *Miller,* 515 U. S., at 929 (STEVENS, J., dissenting); *id.,* at 934 (GINSBURG, J., dissenting); *Bush,* 517 U. S., at 1003 (STEVENS, J., dissenting); *id.,* at 1045 (SOUTER, J., dissenting); *Shaw* v. *Hunt,* 517 U. S. 899, 918 (1996) (STEVENS, J., dissenting). This suit exacerbates those concerns.

Legislators, for example, may ask just what the words "predominant racial motive" mean. The question has no obvious answer because racial motives (here efforts to include some additional African-American voters in a particular district) *never* explain a predominant portion of a district's entire boundary (most of which inevitably reflects county lines, other geographical features, and sometimes even a discriminatory history, see App. 120–121); yet those motives *always* predominate in respect to those voters (whether few or many) whom the legislature, with consciousness of race, places for that reason in one district rather than another. More importantly, here, unlike other cases that use somewhat similar words, the Court has not turned to other considerations, such as discriminatory intent, or vote dilution, or even a district's bizarre geographical shape, to help explain, or to limit the scope of, the words themselves. Cf. *Shaw* v. *Hunt, supra; Regester, supra; Reynolds, supra;* and *Gomil-*

lion, supra. Thus, given today's suit, a legislator might reasonably wonder whether he can ever knowingly place racial minorities in a district because, for example, he considers them part of a "community" already there; because he thinks doing so will favor the Democrats (or the Republicans); because he wants to help an African-American incumbent; because he believes doing so will encourage participation in the political process by racial minorities in whom historical discrimination has induced apathy; because he believes that doing so will help those same voters secure representatives that better reflect their needs and desires; or simply because he wants to see more racial minorities elected to office in a Nation that has become increasingly diverse.

The Court has not said that the Constitution forbids the use of race in all these instances. See *Adarand Constructors, Inc.* v. *Peña,* 515 U. S. 200, 237 (1995); see also *Shaw* v. *Reno, supra,* at 646–647; *Miller, supra,* at 920; *Bush, supra,* at 1004 (STEVENS, J., dissenting); *Wygant* v. *Jackson Bd. of Ed.,* 476 U. S., at 280; *Richmond* v. *J. A. Croson Co.,* 488 U. S. 469, 493–494 (1989). If the use of race as a criterion is wrong in some, but not all, of these instances, the legislator will need to know when, and why. And the legislator will need a legal principle that tells him whether, or when, the answers to such questions vary depending upon whether the group is racial or reflects, say, economics, education, or national origin. *Miller, supra,* at 944–945 (GINSBURG, J., dissenting). It seems particularly difficult—without the use of some guiding or limiting principle, such as intent, vote dilution, or even bizarre district shape—to find principled legal answers to what, in the redistricting context, are traditionally political questions.

The decision also increases the risk of significant judicial entanglement in the inherently political redistricting process. See, *e. g., Bush, supra,* at 1035–1040 (STEVENS, J., dissenting); *Miller, supra,* at 934–935 (GINSBURG, J., dissenting); see also *Growe* v. *Emison,* 507 U. S. 25, 33–34 (1993);

Voinovich v. *Quilter,* 507 U. S. 146, 156–157 (1993); *Chapman* v. *Meier,* 420 U. S. 1, 26 (1975); *White, supra,* at 795; *Reynolds,* 377 U. S., at 586; *Colegrove* v. *Green,* 328 U. S. 549, 552–554 (1946). A Court test that forbids the overt use of race in any (or all) of the circumstances listed above will simultaneously permit plaintiffs to bring lawsuits complaining about the covert use of what was overtly forbidden. Any redistricting plan will generate potentially injured plaintiffs, willing and able to carry on their political battles in a judicial forum. And judges (unable to refer, say, to intent, dilution, shape, or some other limiting principle) will find it difficult to dismiss those claims—particularly if (as the majority here says) the law deprives the legislature even of such defenses as a reasonable belief that a particular use of race was legally required.

Nor can I find any legal principle that might constitute a simple, administrable stopping place—a principle that could serve the same function in this context as does the one-person, one-vote rule in the context of reapportionment. See *Miller, supra,* at 938–939 (GINSBURG, J., dissenting). A simple "color blind" test—a test that rules out race consciousness across the board—will not work. *Bush, supra,* at 1060–1062 (SOUTER, J., dissenting). Legislators can and should use race consciously to prevent creating districting plans that discriminate against racial minorities, say, by "diluting" their votes. Cf. *Adarand Constructors, Inc.,* 515 U. S., at 237. Moreover, this Court, recognizing the harm caused by slavery and 80 subsequent years of legal segregation, has held that legislators, within limits, can make conscious use of race in an effort to overcome the present effects of past discrimination. *Ibid.;* see also *Shaw* v. *Reno, supra,* at 646–647; *Miller,* 515 U. S., at 920. There may be other instances as well. Further, any test that applied only to race, ignoring, say, religion or national origin, would place at a *dis*advantage the very group, African-Americans, whom the Civil War Amendments sought to help, see *id.,* at 936–

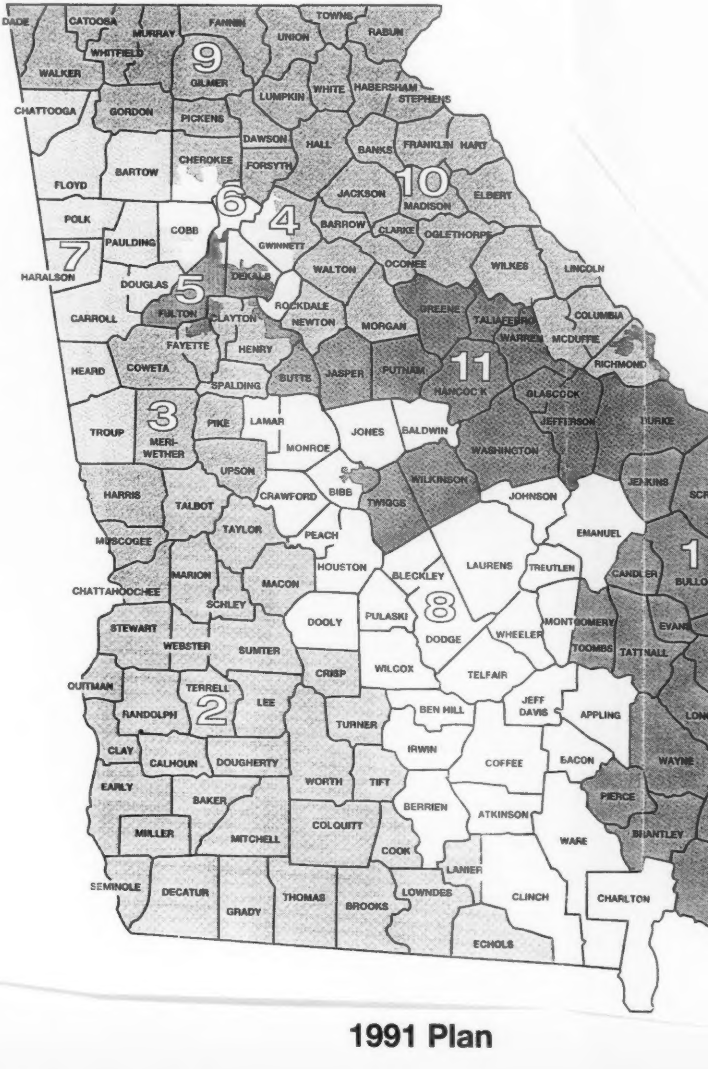
938 (GINSBURG, J., dissenting). But judicial administration of a test that applied to all such voter group characteristics would involve courts yet more deeply in the basically political task of drawing and redrawing district boundaries.

In focusing on these practical considerations, I repeat what previous dissents have argued. I do so because the holding here underscores the problems mentioned in those earlier dissents; and those problems, in turn, cast further doubt upon the soundness of today's decision.

III

I do not necessarily agree or disagree with those other aspects of the majority's opinion that I have not mentioned. But I shall stop with the main point. The Court, perhaps by focusing upon what it considered to be unreasonably pervasive positive use of race as a redistricting factor, has created a legal doctrine that will unreasonably restrict legislators' use of race, even for the most benign, or antidiscriminatory, purposes. And that doctrine will draw the Court too deeply into an area of legislative responsibility. For the reasons set forth here, and in previous dissenting opinions, I do not believe that the Constitution embodies the doctrine that the majority enunciates. And I believe that *Upham* requires us to vacate the District Court's judgment and remand the suit.

[Appendix to opinion of BREYER, J., follows this page.]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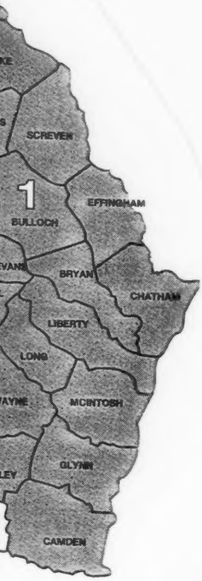

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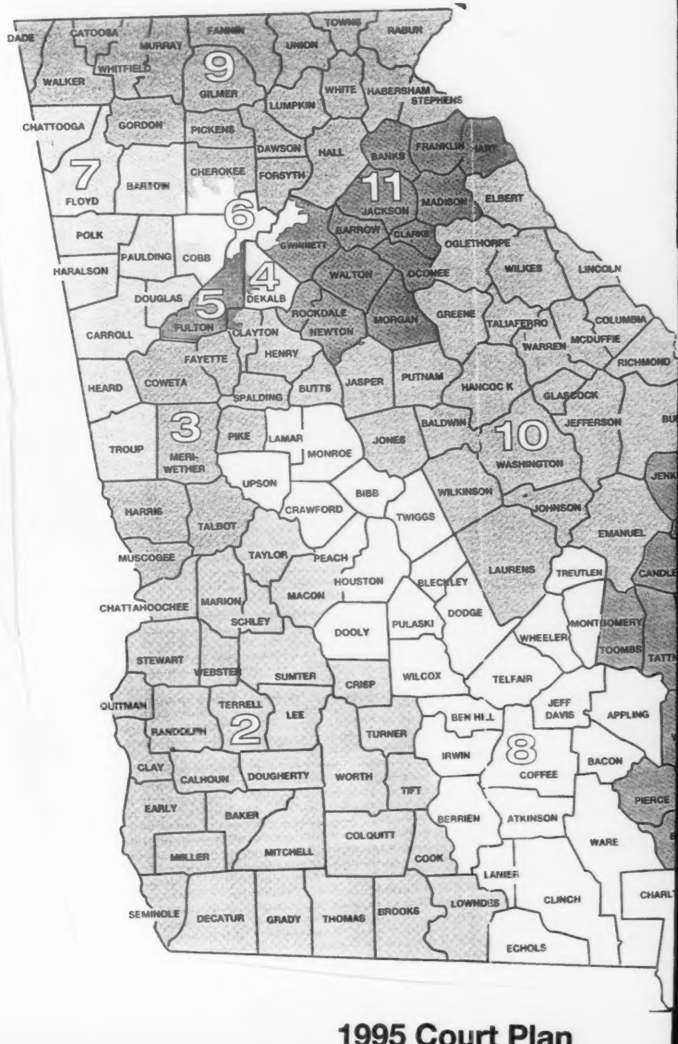

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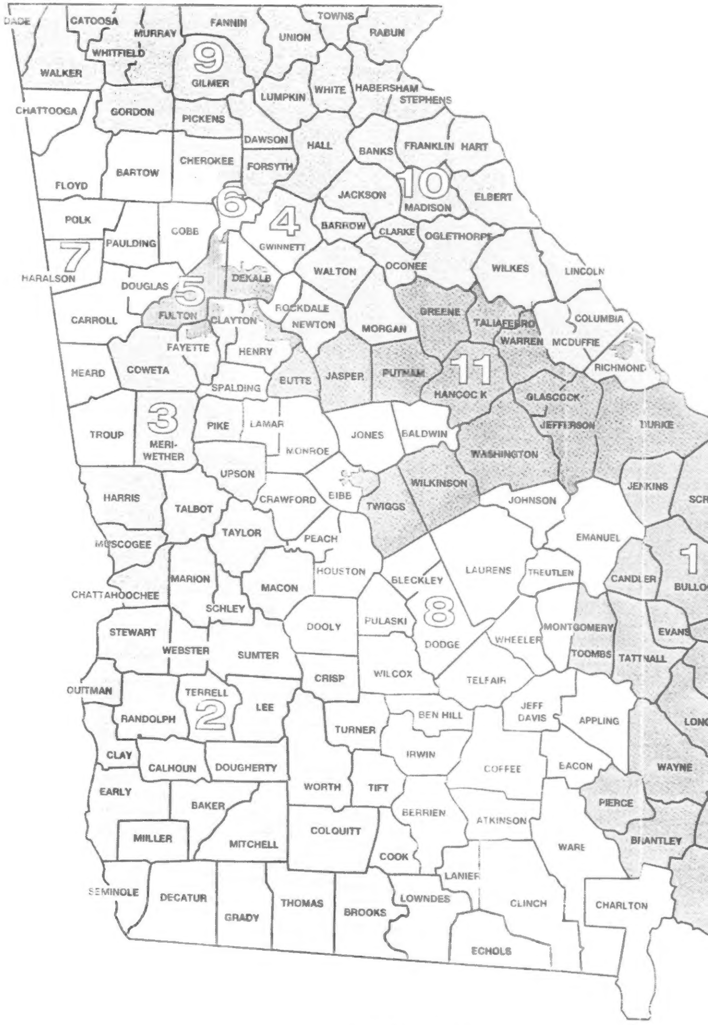
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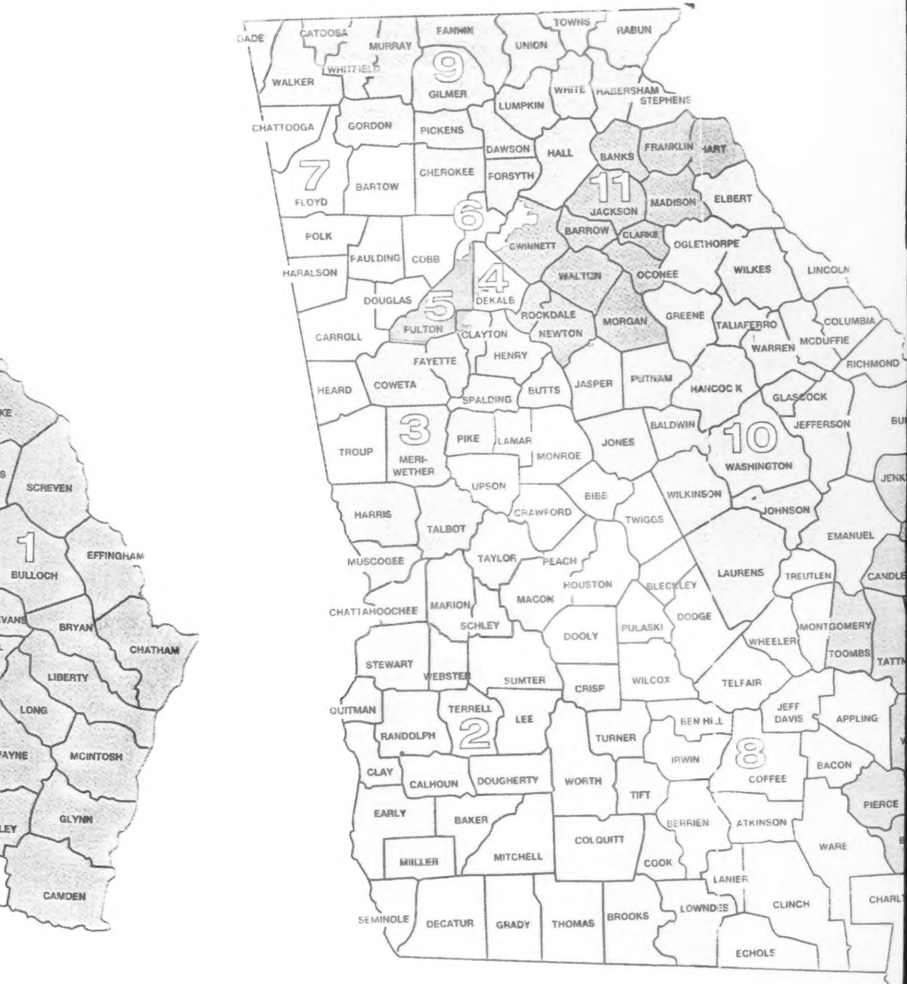

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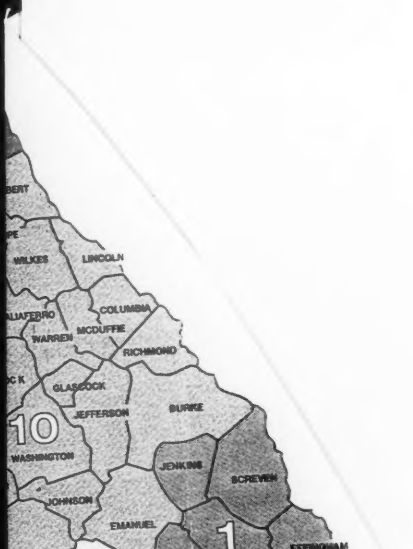
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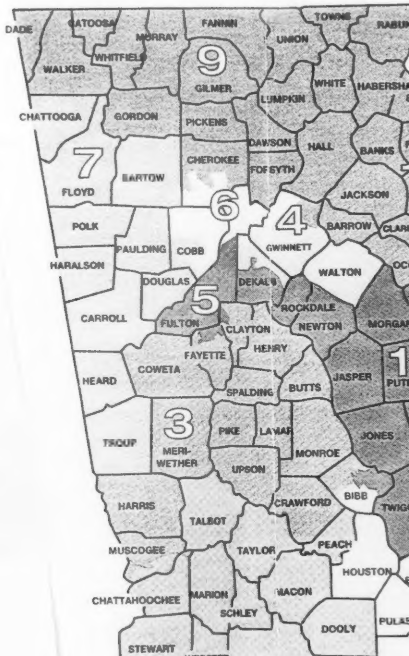
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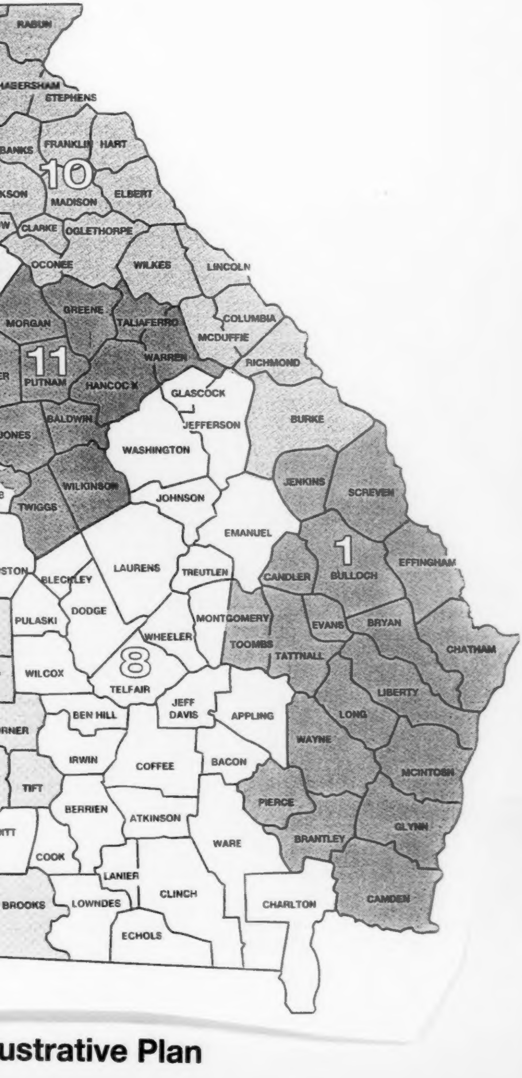
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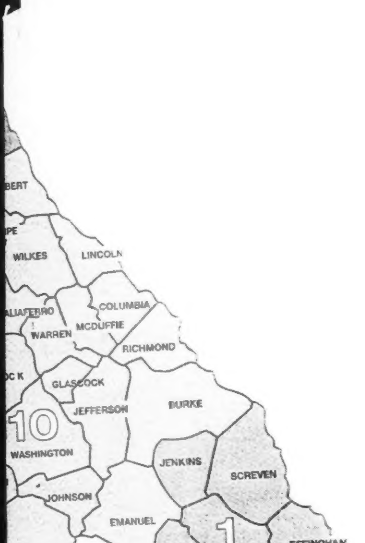
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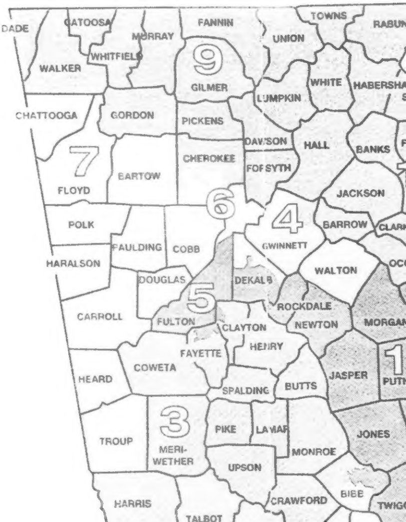
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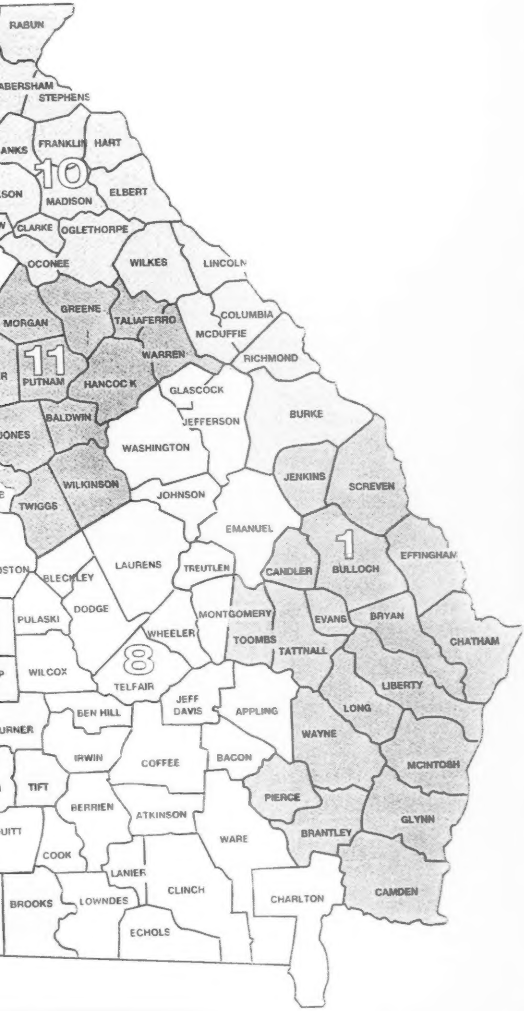
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METROPOLITAN STEVEDORE CO. *v.* RAMBO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 96–272. Argued March 17, 1997—Decided June 19, 1997

Respondent Rambo, injured while doing longshore work for petitioner Metropolitan Stevedore Company, received a compensation award under the Longshore and Harbor Workers' Compensation Act (LHWCA or Act), based on the parties' stipulation that he had sustained permanent partial disability. After Rambo acquired new skills as a longshore-crane operator and began making about three times his preinjury earnings, Metropolitan moved to modify his LHWCA award. Despite an absence of evidence that Rambo's physical condition had improved, the Administrative Law Judge (ALJ) ordered his benefits discontinued because of his increased earnings. The Benefits Review Board affirmed, but the Ninth Circuit reversed on the ground that LHWCA § 22 authorizes modification of an award only for changed physical conditions. This Court in turn reversed in *Metropolitan Stevedore Co.* v. *Rambo*, 515 U. S. 291, holding that the Act's fundamental purpose is economic, to compensate employees for wage-earning capacity lost because of injury; where that capacity has been reduced, restored, or improved, the basis for compensation changes and the statutory scheme allows for modification, *id.*, at 296–298, even without any change in physical condition, *id.*, at 301. On remand, the Ninth Circuit again reversed the order discontinuing compensation. It recognized that when a worker suffers a significant physical impairment without experiencing a present loss of earnings, there may be serious tension between § 8(h)'s mandate to account for disability's future effects in determining wage-earning capacity (and thus entitlement to compensation), and § 22's prohibition against issuing any new order to pay benefits more than one year after compensation ends or an award denial is entered. The court reconciled the two provisions by reading the Act to authorize a present nominal award subject to later modification if conditions should change. It held that the order discontinuing benefits was based on the ALJ's overemphasis on Rambo's current status and failure to consider his permanent partial disability's effect on his future earnings, and remanded the case for entry of a nominal award.

Held:

1. A worker is entitled to nominal compensation under the LHWCA when his work-related injury has not diminished his present wage-

earning capacity under current circumstances, but there is a significant potential that the injury will cause diminished capacity under future conditions. The Act refers to compensable economic harm as "disability," defining that term as the measure of earning capacity lost as a result of work-related injury, § 2(10). Section 8(c)(21) sets compensation for permanent partial disability due to unscheduled injuries at a percentage of the difference between the worker's average weekly pre-injury wages and his wage-earning capacity thereafter, while § 8(h) explains that such capacity is to be determined by the worker's actual earnings if they fairly and reasonably represent that capacity; if not, the factfinder may, "in the interest of justice," fix such capacity as shall be "reasonable," having due regard for, *inter alia*, "the effect of disability as it may naturally extend into the future." A problem in applying these provisions arises in the situation here at issue, where a worker presently earning at least as much as before his injury, but having a basis to anticipate that a future combination of the injury and job-market conditions will leave him with a lower earning capacity, must nevertheless file his disability claim within a year of the injury under § 13(a). If the worker is awarded no compensation, § 22 will bar him from seeking a modification in response to future changes in condition after one year. To implement § 8(h)'s mandate in this class of cases, "disability" must be read broadly enough to cover loss of capacity not just as a product of the worker's injury and present job market conditions, but as a potential product of injury and market opportunities in the future. Thus, a potential disability is treated as a present disability, albeit a presently nominal one. It is "reasonable" and "in the interest of justice" (to use § 8(h)'s language) to reflect merely nominal current disability with a correspondingly nominal award. Ordering nominal compensation holds open the possibility of a modification upward under § 22 if in the future circumstances so warrant. This approach is consistent with the wait-and-see approach the Act adopts generally with respect to benefits modification questions, and is the best way to reconcile § 8(h)'s mandate to consider future effects with the requirements of §§ 13(a) and 22. The Court's view on this point coincides with, and is reinforced by, the position of the Director of the Office of Workers' Compensation Programs (OWCP), who is charged with administering the Act. It would be imprudent for the Court to attempt to resolve for all time the question of how high the potential for disability need be to be recognized as nominal, since that issue was not addressed by the parties. Those lower courts to have dealt with the matter have required a showing of a significant possibility of a future decline in wage-earning capacity, and, in the absence of rulemaking by the OWCP on the point, the Court adopts that standard. Pp. 126–138.

2. Although the Ninth Circuit adopted the correct legal standard, it erred in directing entry of a nominal award based on its own appraisal of the evidence, rather than remanding the case to the ALJ for further findings of fact. Since the ALJ is the factfinder under the Act, see §§21(b)(3), (c), it is the ALJ's duty, not the Court of Appeals's, to consider whether a future decline in Rambo's earning capacity is sufficiently likely to justify nominal compensation. The ALJ failed to do so. Pp. 138–141.

81 F. 3d 840, vacated and remanded.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, KENNEDY, GINSBURG, and BREYER, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined, *post,* p. 141.

Robert E. Babcock argued the cause and filed a brief for petitioner.

Malcolm L. Stewart argued the cause for the federal respondent. With him on the brief were *Acting Solicitor General Dellinger, Deputy Solicitor General Kneedler, J. Davitt McAteer, Allen H. Feldman, Nathaniel I. Spiller,* and *Scott Glabman. Thomas J. Pierry III* argued the cause for respondent Rambo. With him on the brief was *Thomas J. Pierry.**

JUSTICE SOUTER delivered the opinion of the Court.

This case under the Longshore and Harbor Workers' Compensation Act is before us a second time, now raising the question whether the Act bars nominal compensation to a worker who is presently able to earn at least as much as before he was injured. We hold nominal compensation proper when there is a significant possibility that the worker's wage-earning capacity will fall below the level of his preinjury wages sometime in the future.

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*Briefs of *amici curiae* urging reversal were filed for the National Association of Waterfront Employers et al. by *Charles T. Carroll, Jr., F. Edwin Froelich,* and *Franklin W. Losey;* and for the National Steel and Shipbuilding Co. by *Alvin G. Kalmanson* and *Roy D. Axelrod.*

I

Respondent John Rambo injured his back and leg in 1980 while doing longshore work for petitioner Metropolitan Stevedore Company. Rambo claimed against Metropolitan for compensation under the Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 44 Stat. 1424, as amended, 33 U. S. C. § 901 *et seq.*, and the parties stipulated that Rambo had sustained a 22½% permanent partial disability, which would normally reflect a $120.24 decline in his preinjury $534.38 weekly wage. This, in turn, was reduced to an award of $80.16 per week under § 8(c)(21) of the Act, 33 U. S. C. § 908(c)(21), providing for compensation at the rate of 66⅔% of the difference between an employee's preinjury wages and postinjury wage-earning capacity. An Administrative Law Judge (ALJ) entered an order incorporating this stipulated award. App. 51; *Metropolitan Stevedore Co.* v. *Rambo (Rambo I)*, 515 U. S. 291, 293 (1995).

Rambo was later trained as a longshore crane operator and got full-time work with his new skills, with occasional stints as a heavy-truck operator to earn extra pay. His resulting annual earnings between 1985 and 1990 were about three times what he had made before his injury. As a consequence, Metropolitan moved in 1989 to modify Rambo's earlier disability award, see § 22, 33 U. S. C. § 922, and a hearing was held before an ALJ. While there was no evidence that Rambo's physical condition had improved, the ALJ ordered the disability payments discontinued based on the tripling of Rambo's preinjury earnings:

> "After taking into consideration the increase in wages due to the rate of inflation and any increase in salary for the particular job, it is evident that [Rambo] no longer has a wage-earning capacity loss. Although [Rambo] testified that he might lose his job at some future time, the evidence shows that [Rambo] would not be at any

> greater risk of losing his job than anyone else. Moreover, no evidence has been offered to show that [Rambo's] age, education, and vocational training are such that he would be at greater risk of losing his present job or in seeking new employment in the event that he should be required to do so. Likewise, the evidence does not show that [Rambo's] employer is a beneficent one. On the contrary, the evidence shows that [Rambo] is not only able to work full time as a crane operator, but that he is able to work as a heavy lift truck operator when the time is available within which to do so." App. 55.

See also *Rambo I, supra,* at 293–294.

The Benefits Review Board affirmed the modification order, App. 57, 61, but the Court of Appeals for the Ninth Circuit reversed on the ground that §22 authorizes modification of an award only for changed physical conditions, *Rambo* v. *Director, OWCP,* 28 F. 3d 86 (1994). We in turn reversed in *Rambo I,* holding that "[t]he fundamental purpose of the Act is to compensate employees (or their beneficiaries) for wage-earning capacity lost because of injury; where that wage-earning capacity has been reduced, restored, or improved, the basis for compensation changes and the statutory scheme allows for modification." 515 U. S., at 298. Since the essence of wage-earning capacity is economic, not physical, *id.,* at 296–298, that capacity may be affected "even without any change in the employee's physical condition," *id.,* at 301.

On remand, the Court of Appeals again reversed the order discontinuing compensation payments. It recognized that when a worker suffers a significant physical impairment without experiencing a present loss of earnings, there may be serious tension between the statutory mandate to account for future effects of disability in determining a claimant's wage-earning capacity (and thus entitlement to compensation), see § 8(h), 33 U. S. C. § 908(h), and the statutory prohibition against issuing any new order to pay benefits more than one year after compensation ends or an order is entered denying an award, see § 22, 33 U. S. C. § 922. The Court of Appeals reconciled the two provisions by reading the statute to authorize a present nominal award subject to later modification if conditions should change. *Rambo* v. *Director, OWCP,* 81 F. 3d 840, 844 (1996). The court reversed the order ending Rambo's benefits as unsupported by substantial evidence, due to "overemphasi[s on] Rambo's current status and fail[ure] to consider the effect of Rambo's permanent partial disability on his future earnings," *ibid.*, and it remanded for entry of a nominal award reflecting Rambo's permanent partial disability, *id.*, at 845.[1] We granted certiorari. 519 U. S. 1002 (1996). While we agree that nominal compensation may be awarded under certain circumstances despite the worker's present ability to earn more than his preinjury wage, we vacate the judgment of the Court of Appeals directing entry of such an award and remand for factfinding by the ALJ.

II

The LHWCA authorizes compensation not for physical injury as such, but for economic harm to the injured worker from decreased ability to earn wages. See *Rambo I, supra,* at 297–298. The Act speaks of this economic harm as "disability," defined as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment," § 2(10), 33 U. S. C. § 902(10). Such incapacity is conclusively presumed for certain enumerated or "scheduled" injuries, which are compensated at 66⅔% of the worker's preinjury wages over specified periods of time. See §§ 8(c)(1)–8(c)(20), 8(c)(22), 33 U. S. C. §§ 908(c)(1)–908(c)(20), 908(c)(22); *Potomac Elec. Power Co.* v. *Director, Office of Workers' Compensation Pro-*

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[1] Judge Reinhardt dissented in part on other grounds. 81 F. 3d, at 845.

grams, 449 U. S. 268, 269 (1980). For other, so-called "unscheduled" injuries resulting in less than total disability, the Act sets compensation at "66⅔ per centum of the difference between the average weekly [preinjury] wages of the employee and the employee's wage-earning capacity thereafter." § 8(c)(21), 33 U. S. C. § 908(c)(21) (permanent partial disability); see also § 8(e), 33 U. S. C. § 908(e) (temporary partial disability). For figuring this difference, § 8(h) explains that the claimant's postinjury "wage-earning capacity" is to be determined

> "by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future." § 8(h), 33 U. S. C. § 908(h).

See also § 10, 33 U. S. C. § 910 (method for determining preinjury wages). See generally *Rambo I*, 515 U. S., at 297–298.

We may summarize these provisions and their implications this way. Disability is a measure of earning capacity lost as a result of work-related injury. By distinguishing between the diminished capacity and the injury itself, and by defining capacity in relation both to the injured worker's old job and to other employment, the statute makes it clear that disability is the product of injury and opportunities in the job market. Capacity, and thus disability, is not necessarily reflected in actual wages earned after injury, see *id.*, at 300–301; *Potomac Elec. Power, supra,* at 272, n. 5, and when it is not, the factfinder under the Act must make a determination of disability that is "reasonable" and "in the interest of justice," and one that takes account of the disability's future effects, § 8(h).

In some cases a disparity between the worker's actual postinjury wages and his job-market capacity will be obvious, along with the reasons for it. If a disabled worker with some present capacity chooses not to work at all, or to work at less than his capacity, a windfall is avoided by determining present disability and awarding a benefit accordingly. See, *e. g., Penrod Drilling Co.* v. *Johnson,* 905 F. 2d 84, 87–88 (CA5 1990). At the other extreme, a worker with some present disability may nonetheless be fortunate enough to receive not merely the market wages appropriate for his diminished capacity, but full preinjury wages (say, because an employer is generous, for whatever reason). See, *e. g., Travelers Ins. Co.* v. *McLellan,* 288 F. 2d 250, 251 (CA2 1961); see also *Edwards* v. *Director, OWCP,* 999 F. 2d 1374, 1375–1376 (CA9 1993) (holding that wages from short-lived employment do not represent actual earning capacity on open market). Once again, the present disability may still be calculated and a corresponding award made.

A problem in applying the provisions applicable when there is a disparity between current wages and wage-earning capacity arises in a case like this one, however. The worker now receives appropriate market wages as high or higher than those before his injury, thus experiencing no decline in present capacity. And yet (we assume for now) there is some particular likelihood that in the future the combination of injury and market conditions may leave him with a lower capacity. The question is whether such a person is presently disabled within the meaning of the statute, and if so, what provision should be made for the potential effects of disability in the future.

There are two reasons to treat such a person as presently disabled under the statute. The first follows from the provision of law that on its face bars an injured worker from waiting for adverse economic effects to occur in the future before bringing his disability claim, which generally must be filed within a year of injury. § 13(a), 33 U. S. C. § 913(a); *Pillsbury* v. *United Engineering Co.*, 342 U. S. 197 (1952). He is also barred from seeking a new, modified award after one year from the date of any denial or termination of benefits. § 22, 33 U. S. C. § 922. Because an injured worker who has a basis to anticipate wage loss in the future resulting from a combination of his injury and job-market opportunities must nonetheless claim promptly, it is likely that Congress intended "disability" to include the injury-related potential for future wage loss.[2] And because a losing claimant loses for all time after one year from the denial or termination of benefits, it is equally likely that Congress intended such a claimant to obtain some award of benefits in anticipation of the future potential loss.

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[2] A different conclusion might, perhaps, be drawn from our observation 46 years ago in *Pillsbury*, 342 U. S., at 198–199, that the agency allowed claims to be filed within one year of injury but before recovery for present disability could be had. If that practice were assumed to be authorized by the Act, an injured worker who anticipated future loss of earning capacity could file a claim within the 1-year period permitted by § 13(a) yet defer litigation of the claim indefinitely until a capacity loss manifested itself, thereby undercutting our inference from the limitations provision that present disability must be conceived as including the potential for future decline in capacity. But it seems unlikely that when Congress enacted § 13(a) it intended workers to be able to file claims before they could establish all the elements entitling them to compensation. Moreover, while the practical effect of permitting protective filings and indefinitely deferring adjudication is in one respect the same as awarding nominal compensation when there is a significant possibility of future capacity loss, in that both approaches hold open the possibility of compensating a worker when the potential future economic effects of his injury actually appear, the former approach, unlike the latter, has the defect of putting off the adjudication of every element of the worker's claim, including such matters as the work-related nature of the injury, until long after the evidence grows stale. We therefore think that the inference we draw from the limitations provision is the better one.

This conclusion is confirmed by the provision of § 8(h) that in cases of disparity between actual wages and earning capacity, the natural effects of disability that will occur in the future must be given "due regard" as one of the "factors or circumstances in the case which may affect [a claimant's] capacity to earn wages in his disabled condition." Although this mandate is phrased in general terms, its practical effect is limited to the class of cases at issue here, where the worker is presently able to earn at least as much as before his injury. In all other cases, when injury depresses the claimant's wage-earning capacity under the conditions prevailing at the time of an award, so that the present effects of his disability are unquestionably compensable immediately, the Act already makes provision for the future effects of disability by means of § 22, which liberally permits modification of awards in response to changed conditions that occur within one year of the last payment of compensation (or a denial or termination of benefits). 33 U. S. C. § 922. *Rambo I* held that this provision allows modification whenever a changed combination of training and economic (let alone physical) circumstances reduces, restores, or improves wage-earning capacity. 515 U. S., at 296–297.[3] Since ongoing awards may be modified if future possibilities become present realities, there is no need to account for such possibilities in calculating a worker's immediately compensable disability; the Act plainly takes a wait-and-see approach to future contingencies here.[4] The first award in this case was a standard illustration of the proper practice of basing capacity determinations and compensation awards on present reality. If Rambo's initial award had already been discounted to reflect the odds of his obtaining less strenuous but higher paying work in the future, *Rambo I* could hardly have held that the Act permitted reduction of that initial award again when Rambo actually received training as a crane operator and found work using his new skills. The first award simply reflected the degree of diminished capacity operative at the time it was made, and it was proper to revise it when conditions changed.

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[3] As we noted in *Rambo I*, however, not every fluctuation in actual wages is a ground for modification, but only those shifts reflecting a change in the worker's underlying capacity, see 515 U. S., at 300–301, such as a change in physical condition, skill level, or the availability of suitable jobs. "There may be cases raising difficult questions as to what constitutes a change in wage-earning capacity, but we need not address them here." *Ibid.*

[4] In liberally permitting modification, the Act resembles virtually all other workers' compensation schemes. See 3 A. Larson & L. Larson, Law of Workmen's Compensation § 81.10, p. 15–1045 (1996). "[I]t is one of the

Thus, if § 8(h)'s admonition to consider future effects when calculating capacity has any practical application, it must be because it may apply in a case such as this one, in which there is no present wage loss and would thus be no present award if compensation were to be based solely on present employment conditions. If the future were ignored and compensation altogether denied whenever present earning capacity had not (yet) declined, § 22 would bar modification in response to future changes in condition after one year.

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main advantages of the reopening device [in workers' compensation schemes] that it permits a commission to make the best estimate of disability it can at the time of the original award, although at that moment it may be impossible to predict the extent of future disability, without having to worry about being forever bound by the first appraisal." *Id.*, § 81.31(a), at 15–1127 to 15–1132 (footnotes omitted).

The need for finality in workers' compensation awards is further reduced because compensation is paid periodically over the life of the disability, rather than in a lump sum, see §§ 14(a), (b), 33 U. S. C. §§ 914(a), (b) (providing for periodic payment of compensation). Thus, modifying a worker's compensation award generally affects future payments only, rather than retroactively adjusting a prior lump-sum payment. "Under the typical award in the form of periodic payments . . . , the objectives of [workers' compensation] legislation are best accomplished if the commission can increase, decrease, revive, or terminate payments to correspond to a claimant's changed condition," subject, under most such laws, to certain time limitations. 3 Larson, Law of Workmen's Compensation § 81.10, at 15–1045; *id.*, § 81.21, at 15–1046 to 15–1047.

To implement the mandate of § 8(h) in this class of cases, then, "disability" must be read broadly enough to cover loss of capacity not just as a product of the worker's injury and present market conditions, but as a potential product of injury and market opportunities in the future. There must, in other words, be a cognizable category of disability that is potentially substantial, but presently nominal in character.

There being, then, a need to account for potential future effects in a present determination of wage-earning capacity (and thus disability) when capacity does not immediately decline, the question is which of two basic methods to choose to do this. The first would be to make a one-time calculation of a periodic benefit following the approach of the common law of torts, which bases lump-sum awards for loss of future earnings on an estimate of "the difference . . . between the value of the plaintiff's services as they will be in view of the harm and as they would have been had there been no harm." Restatement (Second) of Torts § 924, Comment *d,* p. 525 (1977). This predictive approach ordinarily requires consideration of every possible variable that could have an impact on ability to earn, including "[e]nvironmental factors such as the condition of the labor market, the chance of advancement or of being laid off, and the like." 4 F. Harper, F. James, & O. Gray, Law of Torts § 25.8, pp. 550–551 (2d ed. 1986) (footnote omitted). Prediction of future employment may well be the most troublesome step in this wide-ranging enquiry. As the tripling of Rambo's own earnings shows, a claimant's future ability to earn wages will vary as greatly as opportunity varies, and any estimate of wage-earning potential turns in part on the probabilities over time that suitable jobs within certain ranges of pay will actually be open. In these calculations, there is room for error.[5] Cf. *id.*, § 25.8, at 553

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[5] As a simplified example of the sort of calculation that would be required under this approach, a factfinder might decide in the present case that Rambo has a 75% chance of keeping work as a crane operator with

(to determine lost wage-earning capacity, juries must often "use their judgment (in effect, . . . speculate)"). That juries in tort cases must routinely engage in such difficult predictions (compounded further by discounting for present value) is the price paid by the common-law approach for the finality of a one-time lump-sum judgment.

The second possible way to account for future developments would be to do in this situation just what the Act already does through the modification provision in the run of cases: to wait and see, that is, to base calculation of diminished wage-earning capacity, and thus compensation, on current realities and to permit modifications reflecting the actual effects of an employee's disability as manifested over time. This way, finality is exchanged for accuracy, both in compensating a worker for the actual economic effects of his injury, and in charging the employer and his insurer for that amount alone.

Metropolitan denies that the second, wait-and-see alternative is even open, arguing that § 8(h) gives the factfinder only two choices: either deny compensation altogether because a claimant's actual wages have not diminished, or, if the ALJ concludes that the worker's current income does not fairly represent his present wage-earning capacity, calculate the

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annual earnings of $60,000, and a 25% chance of being laid off from that job and remaining unemployed with no income because his injuries would prevent him from performing more strenuous work, for a weighted average future wage-earning capacity of $45,000. (($60,000 × .75) + ($0 × .25) = $45,000.) Of course, even if the factfinder somehow got the probabilities and earnings for each possible future state right, the weighted average future capacity would rarely correspond to actual developments. In our hypothetical, Rambo's actual future capacity would be $15,000 a year more than his predicted capacity if he kept his job as a crane operator, and $45,000 less if he lost that job and found no other. Thus, if a compensation award were based on the weighted average, Rambo would necessarily end up either overcompensated or undercompensated, even though the Act might meet its objectives for the system as a whole.

extent of the worker's disability (and his consequent entitlement to compensation) *in toto* based on all relevant factors, including the future effects of the disability. See Brief for Petitioner 9. What we have already said, however, shows the unsoundness of Metropolitan's two options.

The practical effect of denying any compensation to a disabled claimant on the ground that he is presently able to earn as much as (or more than) before his injury would run afoul of the Act's mandate to account for the future effects of disability in fashioning an award, since those effects would not be reflected in the current award and the 1-year statute of limitations for modification after denial of compensation would foreclose responding to such effects on a wait-and-see basis as they might arise.[6] On the other hand, trying to honor that mandate by basing a present award on a comprehensive prediction of an inherently uncertain future would, as we have seen, almost always result in present overcompensation or undercompensation. And it would be passing strange to credit Congress with the intent to guarantee fairness to employers and employees by a wait-and-see approach in most cases where future effects are imperfectly foreseeable, but to find no such intent in one class of cases, those in which wage-earning ability does not immediately decline.[7]

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[6] The one possible escape from this conclusion rests on an implausible reading of the Act. A claimant could, arguably, preserve a right to compensation in the future by reapplying within the 1-year period and successively each year thereafter. See §22, 33 U. S. C. §922 (permitting modification "at any time prior to one year after the rejection of a claim"). But this would be a strange way to administer the Act, for its very premise is that a claimant would repeatedly file reapplications knowing his disability to be without present effect and (on Metropolitan's theory) himself without any good-faith claim to the present compensation sought.

[7] The legislative history to the 1938 amendments to the Act, which added §8(h), indicates that Congress understood that the reference to future effects in the new subsection would interact with §22 by allowing compensation for permanent partial disability for employees whose job opportunities are narrowed by injury but whose wages have not declined:

There is moreover an even more fundamental objection to Metropolitan's proposed options. They implicitly reject the very conclusion required to make sense of the combined provisions limiting claims and mandating consideration of future effects: that a disability whose substantial effects are only potential is nonetheless a present disability, albeit a presently nominal one. It is, indeed, this realization that points toward a way to employ the wait-and-see approach to provide for the future effects of disability when capacity does not immediately decline. It is simply "reasonable" and "in the interest of justice" (to use the language of § 8(h)) to reflect merely nominal current disability with a correspondingly nominal award. Ordering nominal compensation holds open the possibility of a modified award if a future conjunction of injury, training, and employment opportunity should later depress the worker's ability to earn wages below the preinjury level, turning the potential disability into an actual one. It allows full scope to the mandate to consider the future effects of disability, it promotes accuracy, it preserves administrative simplicity by obviating cumbersome enquiries relating to the entire range of possible future states of affairs,[8] and it avoids imputing to Congress the unlikely intent

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"[Section 8(h)] provides for consideration of the effects of an injury . . . upon the employee's future ability to earn. . . . Often an employee returns to work earning for the time being the same wages as he earned prior to injury, although still in a disabled condition and with his opportunity to secure gainful employment definitely limited. . . . It is clear that in such a case the employee's ability to compete in the labor market has been definitely affected; and, though at present the employee is paid his former full-time earnings, he suffers permanent partial disability which should be compensable under the . . . Act . . . .

"In a case such as that . . . , an unscrupulous employer might with profit to himself continue the original wages . . . until the . . . right of review of the case (sec. 22) had run, . . . thus defeat[ing] the beneficent provisions of the . . : Act." H. R. Rep. No. 1945, 75th Cong., 3d Sess., 5–6 (1938); S. Rep. No. 1988, 75th Cong., 3d Sess., 1 (1938).

[8] See *Walters* v. *Metropolitan Ed. Enterprises, Inc.*, 519 U. S. 202, 208, 210–211 (1997) (weighing administrative simplicity in favor of permissible construction of statute).

to join a wait-and-see rule for most cases with a predict-the-future method when the disability results in no current decline in what the worker can earn.

Our view, as it turns out, coincides on this point with the position taken by the Director of the Office of Workers' Compensation Programs (OWCP), who is charged with the administration of the Act, and who also construes the Act as permitting nominal compensation as a mechanism for taking future effects of disability into account when present wage-earning ability remains undiminished. See Brief for Director, Office of Workers' Compensation Programs 12–21, 24–31. The Secretary of Labor has delegated the bulk of her statutory authority to administer and enforce the Act, including rulemaking power, to the Director, see *Director, Office of Workers' Compensation Programs* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U. S. 122, 125–126 (1995); *Ingalls Shipbuilding, Inc.* v. *Director, Office of Workers' Compensation Programs,* 519 U. S. 248, 262–263 (1997), and the Director's reasonable interpretation of the Act brings at least some added persuasive force to our conclusion, see, *e. g.*, *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944) (giving weight to agency's persuasive interpretation, even when agency lacks "power to control"); *Robinson* v. *Shell Oil Co.*, 519 U. S. 337, 345–346 (1997).

There is, of course, the question of how high the potential for disability need be to be recognized as nominal, but that is an issue not addressed by the parties, and it would be imprudent of us to address it now with any pretense of settling it for all time. Here it is enough to recall that in those cases where an injury immediately depresses ability to earn wages under present conditions, the payment of actual compensation holds open the option of modification under § 22 even for future changes in condition whose probability of occurrence may well be remote at the time of the original award. Consistent application of the Act's wait-and-see approach thus suggests that nominal compensation permitting future modification should not be limited to instances where a decline in capacity can be shown to a high degree of statistical likelihood. Those courts to have dealt with the matter explicitly have required a showing that there is a significant possibility that a worker's wage-earning capacity will at some future point fall below his preinjury wages, see *Hole* v. *Miami Shipyards Corp.*, 640 F. 2d 769, 772 (CA5 1981); *Randall* v. *Comfort Control, Inc.*, 725 F. 2d 791, 800 (CADC 1984), and, in the absence of rulemaking by the agency specifying how substantial the possibility of future decline in capacity must be to justify a nominal award, we adopt this standard.[9]

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[9] The OWCP Director argues that when the employee has the burden of persuasion, the Administrative Procedure Act's (APA's) preponderance of the evidence standard (see *infra,* at 139) requires him to show that an injury-related future decline in wages is more likely than not to occur. Brief for Director, Office of Workers' Compensation Programs 22–23. The Director's position confuses the degree of certainty needed to find a fact or element under the preponderance standard with the fact or element to be so established, which in this case is the statistical odds that wage-earning capacity will decline in the future. "The burden of showing something by a preponderance of the evidence . . . simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence." *Concrete Pipe & Products of Cal., Inc.* v. *Construction Laborers Pension Trust for Southern Cal.*, 508 U. S. 602, 622 (1993) (internal quotation marks omitted). In other words, the preponderance standard goes to how convincing the evidence in favor of a fact must be in comparison with the evidence against it before that fact may be found, but does not determine what facts must be proven as a substantive part of a claim or defense. See *Greenwich Collieries* v. *Director, OWCP,* 990 F. 2d 730, 736 (CA3 1993) ("A preponderance of the evidence is . . . [e]vidence which is . . . more convincing than the evidence . . . offered in opposition to it . . ." (internal quotation marks omitted)), aff'd, 512 U. S. 267 (1994). Unlike other standards of proof such as reasonable doubt or clear and convincing evidence, the preponderance standard "allows both parties to share the risk of error in roughly equal fashion," *Herman & MacLean* v. *Huddleston,* 459 U. S. 375, 390 (1983) (internal quotation marks omitted), except that "when the evidence is evenly balanced, the [party with the burden of persuasion] must lose," *Director, Of-*

We therefore hold that a worker is entitled to nominal compensation when his work-related injury has not diminished his present wage-earning capacity under current circumstances, but there is a significant potential that the injury will cause diminished capacity under future conditions.

III

The application of this legal standard to the case before us depends in part on how the burden of persuasion is allocated. Section 7(c) of the APA, 5 U. S. C. § 556(d), which applies to adjudications under the Act, see *Director, Office of Workers' Compensation Programs* v. *Greenwich Collieries,* 512 U. S. 267, 270 (1994), places the burden of persuasion on the proponent of an order, *id.*, at 272–281; when the evidence is evenly

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fice of Workers' Compensation Programs v. *Greenwich Collieries,* 512 U. S. 267, 281 (1994). Thus, under the preponderance standard, proof that a future decline in capacity is more likely than not (in the sense that the evidence predicting such a decline is more convincing than the evidence predicting none) would be required only if the fact of such a decline, rather than some degree of probability of its occurrence, were a substantive element of a claim for nominal compensation, which the Director does not maintain.

Even assuming that the Director's formally promulgated construction of the LHWCA would be entitled to deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), see *Director, Office of Workers' Compensation Programs* v. *Newport News Shipbuilding & Dry Dock Co.,* 514 U. S. 122, 134 (1995), we do not defer to the Director's interpretation here of the APA's provision for allocating the burden of persuasion under the preponderance of the evidence standard, for three reasons. (1) The APA is not a statute that the Director is charged with administering. Cf. *Ardestani* v. *INS,* 502 U. S. 129, 148 (1991) (Blackmun, J., dissenting); *Chevron, supra,* at 842; *Professional Reactor Operator Soc.* v. *NRC,* 939 F. 2d 1047, 1051 (CADC 1991). (2) This interpretation does not appear to be embodied in any regulation or similar binding policy pronouncement to which such deference would apply. See *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 740–741 (1996); 1 K. Davis & R. Pierce, Administrative Law Treatise § 3.5, p. 120 (3d ed. 1994). (3) The interpretation is couched in a logical non sequitur, as just explained.

balanced, the proponent loses, see *id.*, at 281. On the initial claim for nominal compensation under the Act, then, the employee has the burden of showing by a preponderance of the evidence that he has been injured and that the odds are significant that his wage-earning capacity will fall below his preinjury wages at some point in the future. But when an employer seeks modification of previously awarded compensation, the employer is the proponent of the order with the burden of establishing a change in conditions justifying modification. In a case like this, where the prior award was based on a finding of economic harm resulting from an actual decline in wage-earning capacity at the time the award was entered, the employer satisfies this burden by showing that as a result of a change in capacity the employee's wages have risen to a level at or above his preinjury earnings. Once the employer makes this showing, § 8(h) gives rise to the presumption that the employee's wage-earning capacity is equal to his current, higher wage and, in the face of this presumption, the burden shifts back to the claimant to show that the likelihood of a future decline in capacity is sufficient for an award of nominal compensation. We emphasize that the probability of a future decline is a matter of proof; it is not to be assumed *pro forma* as an administrative convenience in the run of cases.

In this case, the first award of compensation was based on the parties' stipulation that Rambo suffered 22½% permanent partial disability as a result of his injury, whereby Rambo established that the injury impaired his ability to undertake at least some types of previously available gainful labor and thus prevented him from earning as much as he had before his accident. Metropolitan sought termination of the award based solely on evidence, which the ALJ found persuasive, that Rambo is now able to earn market wages as a crane operator significantly greater than his preinjury earnings. There is therefore substantial evidence in the record supporting the ALJ's decision to terminate actual (as opposed to nominal) benefits, since under present conditions Rambo's capacity to earn wages is no longer depressed. But the ALJ failed to consider whether there is a significant possibility that Rambo's wage-earning capacity will decline again in the future.[10] Because there is no evidence in the record of the modification proceedings showing that Rambo's physical condition has improved to the point of full recovery, the parties' earlier stipulation of permanent partial disability at least raises the possibility that Rambo's ability to earn will decline in the event he loses his current employment as a crane operator. The ALJ's order altogether terminating benefits must therefore be vacated for failure to consider whether a future decline in Rambo's earning capacity is sufficiently likely to justify nominal compensation. Since the ALJ is the factfinder under the Act, see §§ 21(b)(3), (c), 33 U. S. C. §§ 921(b)(3), (c), however, the Court of Appeals should have remanded to the agency for further findings of fact, see, *e. g., Randall* v. *Comfort Control, Inc.*, 725 F. 2d, at 799–800 (remanding for consideration of nominal award), instead of directing entry of a nominal award based on its own appraisal of the evidence. We therefore vacate the Ninth Circuit's judgment insofar as it directs entry of an award of nominal compensation, and remand the case for further proceedings consistent with this opinion.

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[10] The dissent argues that the ALJ expressly found that Rambo's present wages adequately reflect his future prospects. *Post,* at 148–150. In our view, however, the language in the modification order relied on by the dissent addresses whether Rambo's current wages accurately reflect his earning capacity under present market conditions, see *supra,* at 128 (current wages do not always reflect current capacity); *Edwards* v. *Director, OWCP,* 999 F. 2d 1374, 1375 (CA9 1993) (adopting OWCP Director's position that "earnings in post-injury employment must be sufficiently regular to establish true earning capacity"), not the distinct question whether there is a significant chance that his ability to earn will again decline in the future. See App. 53 (ALJ characterized his task as "consider[ing] wage-earning capacity in an open labor market under normal employment conditions"). The ALJ's failure to consider the latter question is not surprising, since prior to this case there was no governing authority from this Court or the Ninth Circuit approving nominal awards for possible future declines.

It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

The Court holds today that an administrative law judge can award nominal worker's compensation benefits to an injured longshoreman whose wage-earning capacity has not dropped, and probably will never drop, below his preinjury capacity. Because I believe that § 8(h) of the Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U. S. C. § 908(h), requires that a worker be compensated if and only if a preponderance of the evidence demonstrates that he has a reduced wage-earning capacity—that is, a present or future loss of earning power—I respectfully dissent.

As an initial matter, I note my agreement with some of the starting points for the Court's analysis. It is common ground that "disability" under the LHWCA is an economic, rather than a medical, concept. *Ante,* at 126; *Metropolitan Stevedore Co.* v. *Rambo,* 515 U. S. 291, 297 (1995). Likewise, I agree that a worker's eligibility for compensation (*i. e.,* his disability) under the LHWCA turns on his wage-earning capacity, which depends on his ability to earn wages now and in the future. That is, I agree that an injured worker who is currently receiving high wages, but who is likely to be paid less in the future due to his injury, is disabled under the LHWCA and is therefore eligible for compensation today. See *ante,* at 128–129.

I part company with the Court first because, in my view, § 8(h) of the LHWCA, 33 U. S. C. § 908(h), requires an administrative law judge (ALJ) to make an up-front finding that "fix[es]" the worker's wage-earning capacity (and hence his eligibility for compensation) by taking into account both the worker's present and future ability to earn wages. Second, a finding of future economic harm must be supported by a preponderance of the evidence pursuant to the Administrative Procedure Act (APA), 5 U. S. C. § 551 *et seq.*, in order to affect a claimant's wage-earning capacity. Finally, because I read the ALJ's decision as expressly finding that respondent Rambo will probably suffer no future loss of earning power, and because that finding is supported by substantial evidence, I would reverse the decision of the Court of Appeals and direct the entry of judgment for petitioner Metropolitan Stevedore Co.

I

My first point of disagreement with the Court is over how an ALJ should fix the wage-earning capacity of a worker like Rambo, whose current wages exceed his preinjury wages, but who claims that his ability to earn money may drop in the future. Section 8(h) of the LHWCA provides:

> "The wage-earning capacity of an injured employee in cases of partial disability . . . shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however*, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future."

The Court holds that § 8(h) permits an adjudicator simply to postpone any determination of whether the worker will suffer a loss in earning power so long as there is a "significant possibility" that such a loss will someday come to pass.

Ante, at 137. Until then, the Court rules, the ALJ can award nominal compensation, thereby propping open the agency's door for the worker to seek modification of the award in the future.

In my opinion, the LHWCA does not permit an ALJ to award purely nominal benefits in order to guard against the possibility of a future drop in earning power. Instead, the Act requires that a future reduction in a longshoreman's ability to earn money be immediately factored into a *present* determination of his wage-earning capacity. That an ALJ must make a concrete, immediate finding about a worker's wage-earning capacity is dictated by the language of § 8(h), which calls for a determination whether a worker's actual earnings "fairly and reasonably represent his wage-earning capacity." A comparison between a worker's current wages and his earning potential is possible only if the ALJ assigns a dollar amount to the claimant's wage-earning capacity. Section 8(h) further instructs that, if the worker's current pay does not correspond to his true earning capacity, the adjudicator must "fix such wage-earning capacity as shall be reasonable." Again, "fix[ing]" the worker's wage-earning capacity requires the ALJ to make a definite assessment of whether the claimant's capacity has gone up, down, or remained the same; it leaves no room for the equivocal finding that a worker's capacity *might* have changed.

The "wage-earning capacity" that an ALJ must fix is a composite concept, measured partly by the claimant's present earning ability and partly by his future earning ability. Accordingly, the ALJ's finding must reflect predictable changes in the worker's ability to earn wages. Section 8(h) lists the main factors to be taken into account: the nature of his injury, the degree of physical impairment, his usual employment, and the effect of the disability as it may naturally extend into the future. Thus, if an ALJ credits a doctor's testimony that a claimant can work for only five years before his injury leaves him bedridden, that worker would presently have a reduced "wage-earning capacity" within the meaning of the LHWCA, regardless of whether his current wages were as high as his preinjury wages. Just because market conditions and the claimant's physical condition may vary over time does not mean that an ALJ should not consider predicted variations when fixing the worker's wage-earning capacity. Quite to the contrary, the ALJ must consider them; otherwise, he would not be "fix[ing]" the worker's capacity at all, but simply putting off that determination for another day.

Because an ALJ must make a definite finding regarding a worker's wage-earning capacity, I disagree with the Court that a worker can ever, for purposes of the LHWCA, have a "nominal current disability." *Ante,* at 135. A worker either has a reduced wage-earning capacity (however slight it may be), or he does not. To say that a claimant has a "nominal current disability," as far as I can tell, means only that he is *currently* making as much as his preinjury wages. But that answers only half the question, since the worker's *future* earning potential is also relevant to whether he has a reduced wage-earning capacity today and, hence, a compensable disability.

The Court conflates a worker's foreseeable future earning power, which must be considered when awarding benefits, with unforeseeable future developments, which justify reopening an award under § 22 of the LHWCA, 33 U. S. C. § 922. Section 22 acknowledges that a worker's wage-earning capacity can change over time, since it authorizes the Benefits Review Board to modify compensation orders in light of a "change in conditions." All that means is that when circumstances arise that were not predictable in the original benefits determination, and hence were not factored into a prior determination of a worker's wage-earning capacity, an ALJ can adjust an award. If, on the other hand, those circumstances were predicted in the original proceeding, they should have been included in the initial fixing of the claimant's wage-earning capacity. The catch is that § 22 permits recognition of changed conditions only within one year of the denial of a claim or the last payment on an award.

The Court's mechanism for awarding nominal damages is designed solely to circumvent § 22's 1-year limit for reopening terminated or denied claims. The Court effectively recognizes as much, since it candidly admits that under its approach, "finality is exchanged for accuracy." *Ante,* at 133. That is, the 1-year limitations period established by § 22 is sacrificed in order to avoid the overcompensation and undercompensation that may result from a straightforward application of the LHWCA. *Ibid.* Congress has already evaluated these policy concerns, however, and has come down on the side of finality by enacting § 22. When a worker cannot demonstrate a reduction in his wage-earning capacity, in terms of his present or future ability to obtain gainful employment, § 22 gives that employee only one year to show that conditions have changed. To hold open a case simply because a "change in conditions" may someday arise certainly violates the spirit, if not the letter, of § 22.

The proper tradeoff between finality and accuracy is open to reasoned debate. Indeed, some state legislatures have agreed with the Court that when a worker does not immediately suffer as a result of his work-related injury, it is better to postpone compensation until his disability manifests itself. Accordingly, they have amended their workers' compensation statutes to allow precisely the sort of nominal-benefits mechanism that the Court approves today. See, *e. g.,* Cal. Lab. Code Ann. § 5802 (West 1989) ("If, in any proceeding under this division, it is proved that an injury has been suffered . . . , but it is not proved that any disability has resulted, the appeals board may, instead of dismissing the application, award a nominal disability indemnity, if it appears that disability is likely to result at a future time"). But until Congress amends the LHWCA, I do not think that the Court's approach is open to us. I would therefore hold that an ALJ cannot circumvent § 22's 1-year limitations period by awarding nominal compensation. He must instead make a present determination of the longshoreman's wage-earning capacity, taking into account both his present and future ability to earn money.

II

I further believe that the APA requires that a claimant's future economic injury be proved by a preponderance of the evidence before such an injury can provide a basis for awarding disability benefits under the LHWCA. This is true regardless of whether such a finding leads to an award of nominal benefits (as the Court holds) or whether such an injury should instead be factored into a claimant's wage-earning capacity immediately (as I believe). I therefore disagree with the Court's holding that merely a "significant possibility" of a future drop in a worker's wage-earning potential is relevant to a present benefits determination.

As explained in Part I, the ultimate fact to be determined in an LHWCA benefits proceeding is a worker's "wage-earning capacity," which has both a present and a future component. Thus, contrary to the Court, I think that "the fact of such a decline [in a worker's wage-earning capacity], rather than some degree of probability of its occurrence," *ante*, at 138, n. 9, must be shown in order to justify a finding of disability. The Court recognizes that the APA governs benefit determinations under the LHWCA, *ante*, at 138, so that "the proponent of a rule or order has the burden of proof," 5 U. S. C. § 556(d); see 33 U. S. C. § 919(d) ("[A]ny hearing held under [the LHWCA] shall be conducted in accordance with the provisions of" the APA). And this proof must be by a preponderance of the evidence. *Director, Office of Workers' Compensation Programs* v. *Greenwich Collieries*, 512 U. S. 267, 270–271 (1994). It follows that whether a worker has a reduced wage-earning capacity is a fact to be determined by a preponderance of the evidence.

The Court's "significant possibility" standard falls far short of the APA's preponderance of the evidence standard. Indeed, although the Court fails to define its standard with any specificity, it at least tells us that a "significant possibility" is certainly less than a "high degree of statistical likelihood." *Ante,* at 137. Thus, a longshoreman whose paycheck has not shrunk, and is unlikely ever to shrink, below preinjury levels is apparently entitled to an award of nominal damages under the Court's holding today. Such a result, it seems to me, is exactly backwards.

Not only does the "significant possibility" standard conflict with the APA, but the Court plucks it out of thin air. The Court seems to rely purely on its perception of "symmetry" in the LHWCA: Where an injury immediately depresses a worker's ability to earn wages, "the payment of actual compensation holds open the option of modification under § 22 even for future changes in condition whose probability of occurrence may well be remote at the time of the original award. Consistent application of the Act's wait-and-see approach thus suggests that nominal compensation permitting future modification should not be limited to instances where a decline in capacity can be shown to a high degree of statistical likelihood." *Ante,* at 136–137. But if symmetry is the goal, then there should logically be no threshold showing (beyond the injury itself) required to award nominal benefits under the LHWCA. Because § 22 permits modification of ongoing awards even for *completely unforeseeable changes of conditions,* "[c]onsistent application" of the Court's "wait-and-see" theory (derived from § 22) would call for keeping open *every* case to guard against the possibility that new events might someday reduce a worker's wage-earning capacity. The Court apparently realizes that such a result would completely eviscerate § 22's 1-year limitations period, and so it feels obliged to screen out at least the most attenuated claims that conditions may change in the future. As a stopgap, it invents the "significant possibility" test.

This supposed "asymmetry" in the LHWCA is not something to be circumvented, however, since it is attributable to Congress' decision to place a strict 1-year time limit on the reopening of denied or terminated claims. Under the proper interpretation of the LHWCA, a worker's wage-earning capacity is partly a function of his future ability to earn money, as proved by a preponderance of the evidence. This preponderance standard screens out claims where a worker cannot show a reduction in his future earning power. Accordingly, there is no need to engage in the sort of arbitrary line-drawing that brings us the "significant possibility" standard, in order to salvage some role for § 22's 1-year limitations period.

III

As a final matter, I believe that the ALJ's conclusion that Rambo "no longer has a wage-earning capacity loss," App. 55, should be upheld regardless of whether the standard for fixing a worker's wage-earning capacity is the one set forth by the Court or the one described in this dissent.

I agree with the Court that Metropolitan, as the proponent of a modified compensation order, met its burden of demonstrating a "change in conditions" by proving that Rambo's actual earnings had risen significantly since he began steadily working as a crane operator. *Ante*, at 139. Upon that showing, § 8(h) shifted to Rambo the burden of proving that his new earnings did not fairly and reasonably reflect his wage-earning capacity. *Ibid.* In other words, Rambo must show that his ability to earn wages in the future is more likely than not to dip below his preinjury levels.

In his written ruling, the ALJ gave this issue his full consideration. As the ALJ observed, "higher post-injury gains/losses are not necessarily determinative of an employee's wage-earning capacity. One has to consider wage-earning capacity in an open labor market under normal employment conditions." App. 53 (citation omitted). The ALJ then specifically commented on Rambo's future job prospects: "Claimant no longer has a wage-earning capacity loss. Although Claimant testified that he might lose his job at some future time, the evidence shows that Claimant would not be at any greater risk of losing his job than anyone else. Moreover, no evidence has been offered to show that Claimant's age, education, and vocational training are such that he would be at greater risk of losing his present job or in seeking new employment in the event that he should be required to do so. Likewise, the evidence does not show that Claimant's employer is a beneficent one." *Id.*, at 55. As I read this statement, the ALJ found that Rambo's current earnings adequately reflected his future job prospects—that is, he found that Rambo would not suffer any future economic loss due to his injury.

The ALJ's findings must be upheld if they are supported by substantial evidence. See 33 U. S. C. § 921(b)(3) (setting standard of review that Benefits Review Board must apply to ALJ's findings). The substantial evidence standard is extremely deferential to the factfinder: "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 229 (1938). Based on the evidence submitted by the parties, a "reasonable mind" could undoubtedly have found that Rambo's current earnings accurately reflected his wage-earning capacity, with regard to both his present and future job prospects. Rambo testified that he had learned to operate cranes and heavy lift trucks (tasks that he can perform despite his injury), App. 30–31; that he had worked steadily as a crane operator for one shipping line for the last 2½ years, *id.*, at 37; and that his new job paid a much higher wage than he had received before his injury, *id.*, at 38. The record clearly permitted a finding that, despite his injury, Rambo "no longer has a wage-earning capacity loss." *Id.*, at 55.

Because the ALJ properly found that Rambo's current earnings reasonably reflected his wage-earning capacity, I see no need to remand this case for further proceedings simply to demand of the ALJ a finding that he has already made. The Benefits Review Board's denial of compensation should be upheld and the Court of Appeals' decision should be reversed.

O'DELL *v.* NETHERLAND, WARDEN, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 96–6867. Argued March 18, 1997—Decided June 19, 1997

At the penalty phase of petitioner's state trial on capital murder, rape, and sodomy charges, evidence was presented that he had been convicted of a host of other offenses—including the kidnaping and assault of another woman while he was on parole and the murder of a fellow prisoner during a previous prison stint. The court denied his request for a jury instruction that he was ineligible for parole if sentenced to life in prison. The jury determined that petitioner presented a future danger, and he was sentenced to death. In subsequently granting federal habeas relief, the District Court concluded that this Court's intervening decision in *Simmons* v. *South Carolina,* 512 U. S. 154—which requires that a capital defendant be permitted to inform his sentencing jury that he is parole ineligible if the prosecution argues his future dangerousness—was not a "new" rule within the meaning of *Teague* v. *Lane,* 489 U. S. 288, and thus entitled petitioner to resentencing. The Fourth Circuit reversed.

Held: Simmons' rule was new and cannot, therefore, be used to disturb petitioner's death sentence. Pp. 156–168.

(a) Under *Teague,* this Court will not disturb a final state conviction or sentence unless it can be said that, at the time the conviction or sentence became final, a state court would have acted objectively unreasonably by not extending the relief later sought in federal court. *Teague* requires a federal habeas court to determine the date on which the conviction became final; to consider whether a state court considering the defendant's claim at the time it became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution; and if not, to determine whether that new rule nonetheless falls within one of two narrow exceptions to the *Teague* doctrine. *Lambrix* v. *Singletary,* 520 U. S. 518, 527. Pp. 156–157.

(b) Petitioner's conviction became final in 1988 and *Simmons* was decided in 1994. *Simmons* is an unlikely candidate for "old-rule" status. There was no opinion for the Court in *Simmons,* and the array of views expressed there suggests that the rule announced was, in light of this Court's precedent, "susceptible to debate among reasonable minds." *Butler* v. *McKellar,* 494 U. S. 407, 415. An assessment of the legal landscape existing at the time petitioner's conviction and sentence became final bolsters this conclusion. Contrary to petitioner's position, the result in *Simmons* did not follow ineluctably from the decisions in *Gardner* v. *Florida,* 430 U. S. 349, and *Skipper* v. *South Carolina,* 476 U. S. 1. The seven opinions in *Gardner* produced a narrow holding that a death penalty procedure permitting consideration of secret information relevant to the offender's character and record—there a presentence report not provided to the defendant—violates the Eighth Amendment. Petitioner points to no secret evidence in his case. And the evidence he sought to present to the jury was not historical evidence about his character and record but evidence concerning what might happen, under then-extant law, after a sentence was imposed. In *Skipper,* too, it was evidence of past behavior that the defendant was unconstitutionally prevented from adducing. The distinction between information concerning state postsentencing law and evidence specifically related to the defendant was also at the heart of two other cases in 1988's complex legal landscape. In *California* v. *Ramos,* 463 U. S. 992, the Court concluded that California had reasonably chosen to provide some, limited, postsentence information to the capital sentencing jury, namely, the possibility of pardon. But the Court emphasized that this conclusion did not override the choices of other States *not* to permit their juries to be informed of postsentencing proceedings, including parole. The general proposition that the States retained the prerogative to determine how much (if at all) juries would be informed about the postsentencing legal regime was given further credence in *Caldwell* v. *Mississippi,* 472 U. S. 320. The Court determined there that the prosecution and judge had improperly left the jury with the impression that a death sentence was not final because it would be extensively reviewed, with a plurality concluding that, *Ramos* notwithstanding, sentencing juries were *never* to be given information about postsentencing appellate proceedings, and JUSTICE O'CONNOR concluding that such information—if accurate—*could* be provided. In light of these cases, it would hardly have been unreasonable for a jurist in 1988 to conclude that his State had acted constitutionally by choosing not to advise its jurors as to events that would (or would not) follow their death sentence recommendation. Accordingly, *Simmons* announced a new rule that may not be applied here unless it falls within a *Teague* exception. Pp. 157–166.

(c) *Simmons'* narrow right of rebuttal is not a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding under the second exception to *Teague.* *Gideon* v. *Wainwright,* 372 U. S. 335, distinguished. P. 167.

95 F. 3d 1214, affirmed.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post*, p. 168.

Robert S. Smith, by appointment of the Court, 520 U. S. 1114, argued the cause for petitioner. With him on the briefs were *Alan Effron* and *Michele J. Brace*.

Katherine P. Baldwin, Assistant Attorney General of Virginia, argued the cause for respondents. With her on the brief were *James S. Gilmore III*, Attorney General, and *David E. Anderson*, Chief Deputy Attorney General.

JUSTICE THOMAS delivered the opinion of the Court.

This case presents the question whether the rule set out in *Simmons* v. *South Carolina*, 512 U. S. 154 (1994)—which requires that a capital defendant be permitted to inform his sentencing jury that he is parole ineligible if the prosecution argues that he presents a future danger—was "new" within the meaning of *Teague* v. *Lane*, 489 U. S. 288 (1989), and thereby inapplicable to an already final death sentence. We conclude that it was new, and that it cannot, therefore, be used to disturb petitioner's death sentence, which had been final for six years when *Simmons* was decided.

I

Helen Schartner was last seen alive late in the evening of February 5, 1985, leaving the County Line Lounge in Virginia Beach, Virginia. Her lifeless body was discovered the next day, in a muddy field across a highway from the lounge. Schartner's head had been laid open by several blows with the barrel of a handgun, and she had been strangled with such violence that bones in her neck were broken and finger imprints were left on her skin. An abundance of physical evidence linked petitioner to the crime scene and crime—among other things, tire tracks near Schartner's body were consistent with petitioner's car, and bodily fluids recovered from Schartner's body matched petitioner. He was indicted on counts of capital murder, rape, sodomy, and abduction (which count was later dismissed).

After a jury trial, petitioner was found guilty on the murder, rape, and sodomy counts. During the subsequent sentencing hearing, the prosecution sought to establish two aggravating factors: that petitioner presented a future danger, and that the murder had been "wanton, vile or inhuman." Evidence was presented that, prior to Schartner's murder, petitioner had been convicted of a host of other offenses, including the kidnaping and assault of another woman while he was on parole, and the murder of a fellow inmate during an earlier prison stint. Petitioner sought a jury instruction explaining that he was not eligible for parole if sentenced to life in prison. The trial judge denied petitioner's request. After the sentencing hearing, the jury found beyond a reasonable doubt that petitioner "would constitute a continuous serious threat to society" and that "his conduct in committing the offense was outrageously wanton, vile or inhuman." 46 Record 208. The jury recommended that petitioner be sentenced to death.[1] The trial judge adopted the jury's recommendation and sentenced petitioner to 40 years' imprisonment each for the rape and sodomy convictions, and to death by electrocution for Schartner's murder. Petitioner appealed to the Supreme Court of Virginia, which affirmed both the conviction and the sentence. *O'Dell* v. *Commonwealth,* 234 Va. 672, 364 S. E. 2d 491 (1988). We denied certiorari. *O'Dell* v. *Virginia,* 488 U. S. 871 (1988). Petitioner's efforts at state habeas relief were unsuccessful, and we again denied certiorari. *O'Dell* v. *Thompson,* 502 U. S. 995 (1991).

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[1] The Virginia Supreme Court concluded that the jury's recommendation of a death sentence was based only on the first aggravating factor—petitioner's future dangerousness. *O'Dell* v. *Commonwealth,* 234 Va. 672, 706, 364 S. E. 2d 491, 510 (1988). Only that aggravating factor is before us.

Petitioner then filed a federal habeas claim. He contended, *inter alia,* that newly obtained DNA evidence established that he was actually innocent, and that his death sentence was faulty because he had been prevented from informing the jury of his ineligibility for parole. The District Court rejected petitioner's claim of innocence. *O'Dell* v. *Thompson,* Civ. Action No. 3:92CV480 (ED Va., Sept. 6, 1994), App. 171–172. But it agreed with petitioner that he was entitled to resentencing under the intervening decision in *Simmons* v. *South Carolina, supra.* The District Court described *Simmons* as holding that "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, the Due Process Clause of the Fourteenth Amendment requires that the sentencing jury be informed that the defendant is not eligible for parole." App. 198. The court concluded that the *Simmons* rule was not new and thus was available to petitioner. Because the prosecutor "obviously used O'Dell's prior releases on cross-examination, and in his closing argument, to argue that the defendant presented a future danger to society," App. 201 (citations omitted), the District Court held that petitioner was entitled to be resentenced if it could be demonstrated that he was in fact ineligible for parole.

A divided en banc Court of Appeals for the Fourth Circuit reversed. 95 F. 3d 1214 (1996). After an exhaustive review of our precedents, the Court of Appeals majority determined that "*Simmons* was the paradigmatic 'new rule,'" *id.,* at 1218, and, as such, could not aid petitioner. The Fourth Circuit was closely divided as to whether *Simmons* set forth a new rule, but every member of the court agreed that petitioner's "claim of actual innocence [was] not even colorable." 95 F. 3d, at 1218; see also *id.*, at 1255–1256 (Ervin, J., concurring in part and dissenting in part). We declined review on petitioner's claim of actual innocence, but granted certiorari to determine whether the rule of *Simmons* was new. 519

U. S. 1050 (1996); see also *ibid.* (SCALIA, J., respecting the grant of certiorari).

II

Before a state prisoner may upset his state conviction or sentence on federal collateral review, he must demonstrate as a threshold matter that the court-made rule of which he seeks the benefit is not "new." We have stated variously the formula for determining when a rule is new. See, *e. g.*, *Graham* v. *Collins*, 506 U. S. 461, 467 (1993) ("A holding constitutes a 'new rule' within the meaning of *Teague* if it 'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or was not '*dictated* by precedent existing at the time the defendant's conviction became final' ") (quoting *Teague*, 489 U. S., at 301) (emphasis in original). At bottom, however, the *Teague* doctrine "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler* v. *McKellar*, 494 U. S. 407, 414 (1990) (citation omitted). "Reasonableness, in this as in many other contexts, is an objective standard." *Stringer* v. *Black*, 503 U. S. 222, 237 (1992). Accordingly, we will not disturb a final state conviction or sentence unless it can be said that a state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court.

The *Teague* inquiry is conducted in three steps. First, the date on which the defendant's conviction became final is determined. *Lambrix* v. *Singletary*, 520 U. S. 518, 527 (1997). Next, the habeas court considers whether " 'a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution.' " *Ibid.* (quoting *Saffle* v. *Parks*, 494 U. S. 484, 488 (1990)) (alterations in *Lambrix*). If not, then the rule is new. If the rule is determined to be new, the final step in the *Teague* analysis requires the court to determine whether the rule nonetheless falls within one of the two narrow exceptions to the *Teague* doctrine. 520 U. S., at 527. The first, limited exception is for new rules "forbidding criminal punishment of certain primary conduct [and] rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Penry* v. *Lynaugh,* 492 U. S. 302, 330 (1989). The second, even more circumscribed, exception permits retroactive application of "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Graham, supra,* at 478 (quoting *Teague, supra,* at 311) (internal quotation marks omitted). "Whatever the precise scope of this [second] exception, it is clearly meant to apply only to a small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty." *Graham, supra,* at 478 (internal quotation marks omitted).

III

Petitioner's conviction became final on October 3, 1988, when we declined to review the Virginia Supreme Court's decision affirming his sentence on direct review. *Simmons,* the rule of which petitioner now seeks to avail himself, was decided in 1994.

In *Simmons,* the defendant had been found guilty of capital murder for the brutal killing of an elderly woman. The defendant had also assaulted other elderly women, resulting in convictions that rendered him—at least as of the time he was sentenced—ineligible for parole. Prosecutors in South Carolina are permitted to argue to sentencing juries that defendants' future dangerousness is an appropriate consideration in determining whether to affix a sentence of death. 512 U. S., at 162–163 (plurality opinion). Simmons sought to rebut the prosecution's "generalized argument of future dangerousness" by presenting the jury with evidence that "his dangerousness was limited to elderly women," none of whom he was likely to encounter in prison. *Id.,* at 157.

Simmons' efforts to shore up this argument by demonstrating to the jury that, under South Carolina law, he was ineligible for parole were rebuffed by the trial court. This Court reversed the judgment of the South Carolina Supreme Court upholding Simmons' death sentence. A plurality of the Court noted that a prosecutor's future dangerousness argument will "necessarily [be] undercut" by "the fact that the alternative sentence to death is life without parole." *Id.*, at 169. The plurality, relying on *Gardner* v. *Florida*, 430 U. S. 349 (1977), and *Skipper* v. *South Carolina*, 476 U. S. 1 (1986), concluded that "[b]ecause truthful information of parole ineligibility allows the defendant to 'deny or explain' the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention." 512 U. S., at 169.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE and JUSTICE KENNEDY, concurred in the judgment, providing the dispositive votes necessary to sustain it. The concurrence recognized:

> "[The Court has] previously noted with approval . . . that '[m]any state courts have held it improper for the jury to consider or to be informed—through argument or instruction—of the possibility of commutation, pardon, or parole.' *California* v. *Ramos*, 463 U. S. [992, 1013, n. 30 (1983)]. The decision whether or not to inform the jury of the possibility of early release is generally left to the States." *Id.*, at 176.

The concurrence also distinguished *Skipper*, noting that *Skipper* involved an attempt to introduce "factual evidence" regarding the defendant himself, while Simmons "sought to rely on the operation of South Carolina's sentencing law" to demonstrate that he did not present a future danger. 512 U. S., at 176. But the concurrence nonetheless concluded that, "[w]hen the State seeks to show the defendant's future dangerousness," the defendant "should be allowed to bring his parole ineligibility to the jury's attention." *Id.*, at 177.

Petitioner asserts that the *Simmons* rule covers his case, and that because he was parole ineligible—but not allowed to relay that information to the jury in order to rebut the prosecutor's argument as to his future dangerousness—*Simmons* requires vacatur of his sentence. Before we can decide whether petitioner's claim falls within the scope of *Simmons*, we must determine whether the rule of *Simmons* was new for *Teague* purposes, and, if so, whether that rule falls within one of the two exceptions to *Teague*'s bar.

A

We observe, at the outset, that *Simmons* is an unlikely candidate for "old-rule" status. As noted above, there was no opinion for the Court. Rather, Justice Blackmun's plurality opinion, for four Members, concluded that the Due Process Clause required allowing the defendant to inform the jury—through argument or instruction—of his parole ineligibility in the face of a prosecution's future dangerousness argument. 512 U. S., at 168–169. Two Members of the plurality, JUSTICE SOUTER and JUSTICE STEVENS, would have further held that the Eighth Amendment mandated that the trial court instruct the jury on a capital defendant's parole ineligibility even if future dangerousness was not at issue. *Id.*, at 172–174 (SOUTER, J., concurring). JUSTICE GINSBURG, also a Member of the plurality, wrote a concurrence grounded in the Due Process Clause. *Id.*, at 174–175. THE CHIEF JUSTICE and JUSTICE KENNEDY joined JUSTICE O'CONNOR's decisive opinion concurring in the judgment, as described above. *Id.*, at 175–178. And, two Justices dissented, arguing that the result did not "fit" the Court's precedents and that it was not, in any case, required by the Constitution. *Id.*, at 180, 185 (opinion of SCALIA, J., joined by THOMAS, J.). The array of views expressed in *Simmons* itself suggests that the rule announced there was, in light of this Court's precedent, "susceptible to debate among reasonable minds." *Butler*, 494 U. S., at 415; cf. *Sawyer* v. *Smith*, 497 U. S. 227, 236–237 (1990) (citing, as evidence that *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985), announced a new rule, the views of the three *Caldwell* dissenters). An assessment of the legal landscape existing at the time petitioner's conviction and sentence became final bolsters this conclusion.

1

Petitioner's review of the relevant precedent discloses the decisions relied upon in *Simmons*, namely, *Gardner* v. *Florida, supra,* and *Skipper* v. *South Carolina, supra.* Petitioner asserts that a reasonable jurist considering his claim in light of those two decisions "would have felt 'compelled . . . to conclude that the rule [petitioner] seeks was required by the Constitution.'" Brief for Petitioner 14 (quoting *Saffle*, 494 U. S., at 488) (emphasis deleted).

In *Gardner*, the defendant received a death sentence from a judge who had reviewed a presentence report that was not made available to the defendant. *Gardner* produced no opinion for the Court. A plurality of the Court concluded that the defendant "was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." 430 U. S., at 362. Justice White concurred in the judgment, providing the narrowest grounds of decision among the Justices whose votes were necessary to the judgment. Cf. *Marks* v. *United States*, 430 U. S. 188, 193 (1977). He concluded that the Eighth Amendment was violated by a "procedure for selecting people for the death penalty which permits consideration of such secret information relevant to the *character and record of the individual offender.*" 430 U. S., at 364 (internal quotation marks omitted; emphasis added).

In *Skipper*, the prosecutor argued during the penalty phase that a death sentence was appropriate because the defendant "would pose disciplinary problems if sentenced to prison and would likely rape other prisoners." 476 U. S., at 3. Skipper's efforts to introduce evidence that he had behaved himself in, and made a "good adjustment" to, jail in the time between his arrest and his trial were rejected by the trial court. *Ibid.* The Court concluded: "[E]vidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. Under *Eddings* [v. *Oklahoma,* 455 U. S. 104 (1982)], such evidence may not be excluded from the sentencer's consideration." 476 U. S., at 5 (footnote omitted). This holding was grounded, as was *Eddings,* in the Eighth Amendment. The Court also cited the Due Process Clause, stating that "[w]here the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty," due process required that "a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'" 476 U. S., at 5, n. 1 (quoting *Gardner, supra,* at 362).

Simmons, argues petitioner, presented merely a variation on the facts of *Skipper.* In each, the prosecution raised the issue of future dangerousness. Skipper was unconstitutionally prevented from demonstrating that he had behaved in prison and thus would not be a danger to his fellow prisoners. Simmons, likewise, says petitioner, was not allowed to inform the jury that he would be in, rather than out of, prison and so could not present a danger to elderly women. Because the rule of *Simmons* was allegedly set forth in the 1986 decision in *Skipper,* which in turn relied upon the 1977 decision in *Gardner,* petitioner argues that his death sentence was flawed when affirmed in 1988, and we may set it aside without running afoul of *Teague.*[2]

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[2] Petitioner makes much of language in the *Simmons* plurality opinion that the "principle announced in *Gardner* was reaffirmed in *Skipper,* and it *compels* our decision today." *Simmons* v. *South Carolina,* 512 U. S. 154, 164–165 (1994) (emphasis added). While this language, expressing the view of four Justices, is certainly evidence tending to prove that the

Even were these two cases the sum total of relevant precedent bearing on the rule of *Simmons*, petitioner's argument that the result in *Simmons* followed ineluctably would not be compelling. *Gardner* produced seven opinions, none for a majority of the Court. Taking the view expressed in Justice White's opinion concurring in the judgment as the rule of *Gardner*, see *Marks*, *supra*, at 193, the holding is a narrow one—that "[a] procedure for selecting people for the death penalty which permits consideration of . . . secret information relevant to the *character and record of the individual offender*" violates the Eighth Amendment's requirement of "reliability in the determination that death is the appropriate punishment." 430 U. S., at 364 (citation and internal quotation marks omitted; emphasis added). Petitioner points to no secret evidence given to the sentencer but not to him. And, the evidence that he sought to present to the jury was not historical evidence about his "character and record," but evidence concerning the operation of the extant legal regime.

In *Skipper*, too, the evidence that the defendant was unconstitutionally prevented from adducing was evidence of his past behavior. It is a step from a ruling that a defendant must be permitted to present evidence of that sort to a requirement that he be afforded an opportunity to describe the extant legal regime. Cf. *Simmons*, 512 U. S., at 176 (O'CONNOR, J., concurring in judgment).

2

Whatever support *Gardner* and *Skipper*, standing alone, might lend to petitioner's claim that *Simmons* was a foregone conclusion, the legal landscape in 1988 was far more complex. Respondents point to, and the Fourth Circuit ma-

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rule of *Simmons* was not new—*i. e.*, that it was "dictated" by then-existing precedent—it is far from conclusive. We have noted that "[c]ourts frequently view their decisions as being 'controlled' or 'governed' by prior opinions even when aware of reasonable contrary conclusions reached by other courts." *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990).

jority relied on, two other cases that had been decided by the time petitioner's conviction became final and that bear on its constitutionality: *California* v. *Ramos,* 463 U. S. 992 (1983), and *Caldwell* v. *Mississippi,* 472 U. S. 320 (1985). In *Ramos,* the Court upheld an instruction that informed the jury that a defendant sentenced to life in prison without parole could nonetheless be rendered parole eligible if the Governor elected to commute his sentence. The Court concluded that the instruction neither introduced a constitutionally irrelevant factor into the sentencing process, 463 U. S., at 1001–1004, nor diverted the jury's attention from the task of rendering an "individualized sentencing determination," *id.,* at 1005. Within the bounds of the Constitution, the Court stated that it would defer to California's "identification of the Governor's power to commute a life sentence as a substantive factor to be presented for the sentencing jury's consideration." *Id.,* at 1013. We emphasized, however, that this conclusion was not to be taken to "override the contrary judgment of state legislatures" that capital juries *not* learn of a Governor's commutation power. *Ibid.* "Many state courts," we pointed out, "have held it improper for the jury to consider or to be informed—through argument or instruction—of the possibility of commutation, pardon, or *parole.*" *Id.,* at 1013, n. 30 (emphasis added); see also *ibid.* (citing, *inter alia,* Ga. Code Ann. § 17–8–76 (1982), and describing that statute as "prohibiting argument as to possibility of pardon, *parole,* or clemency" (emphasis added)). "We sit as judges, not as legislators, and the wisdom of the decision to permit juror consideration of possible commutation is best left to the States." 463 U. S., at 1014. The dissenters in *Ramos* disputed the constitutionality of *ever* informing juries of the Governor's power to commute a death sentence. See *id.,* at 1018 (opinion of Marshall, J., joined by Brennan and Blackmun, JJ.); see also *id.,* at 1019–1020 (asserting that consideration by a capital sentencing jury of a defendant's prospects for commutation *or parole* is unconstitutional).

The general proposition that the States retained the prerogative to determine how much (if at all) juries would be informed about the postsentencing legal regime was given further credence in *Caldwell* v. *Mississippi, supra.* In that case, the prosecution and the judge had, the Court concluded, improperly left the jury with the impression that a death sentence was not final because it would be extensively reviewed. Justice Marshall authored the opinion for the Court except for one portion. In that portion, Justice Marshall—writing for a plurality—concluded that, *Ramos* notwithstanding, sentencing juries were not to be given information about postsentencing appellate proceedings. JUSTICE O'CONNOR, who provided the fifth vote necessary to the judgment, did not join this portion of Justice Marshall's opinion. She wrote separately, stating that, under *Ramos,* a State could choose whether or not to "instruc[t] the jurors on the sentencing procedure, including the existence and limited nature of appellate review," so long as any information it chose to provide was accurate. 472 U. S., at 342 (opinion concurring in part and concurring in judgment).

3

In light of *Ramos* and *Caldwell,* we think it plain that a reasonable jurist in 1988 would not have felt *compelled* to adopt the rule later set out in *Simmons.* As noted above, neither *Gardner* nor *Skipper* involved a prohibition on imparting information concerning what might happen, under then-extant law, after a sentence was imposed. Rather, the information at issue in each case was information pertaining to the defendant's "character and record." Although the principal opinions in *Simmons* found *Skipper* (which, in turn, relied on *Gardner*) persuasive, JUSTICE O'CONNOR distinguished *Skipper* from the facts presented in *Simmons* on this very ground, see 512 U. S., at 176 (opinion concurring in judgment), suggesting that the rule announced in *Simmons* was not inevitable. See also *id.*, at 183 (SCALIA, J., dissenting).

That distinction—between information concerning state postsentencing law on the one hand and evidence specifically related to the defendant on the other—was also at the heart of *Ramos* and *Caldwell.* In *Ramos,* the majority concluded that California had reasonably chosen to provide some, limited, postsentence information to the capital sentencing jury—though it noted that many other States had elected just the opposite. The principal dissent in *Ramos* would have forbidden the provision of *any* information about postsentence occurrences for the very reason that it did not constitute evidence concerning the defendant's "character or the nature of his crime." 463 U. S., at 1022 (opinion of Marshall, J.). In *Caldwell,* the plurality and JUSTICE O'CONNOR contested whether the fact that "appellate review is available to a capital defendant sentenced to death" was "simply a factor that in itself is wholly irrelevant to the determination of the appropriate sentence" (as the plurality concluded, 472 U. S., at 336), or whether provision of that information was a constitutional "policy choice in favor of jury education" (as JUSTICE O'CONNOR concluded, *id.*, at 342 (opinion concurring in part and concurring in judgment)).

A reasonable jurist in 1988, then, could have drawn a distinction between information about a defendant and information concerning the extant legal regime. It would hardly have been *unreasonable* in light of *Ramos* and *Caldwell* for the jurist to conclude that his State had acted constitutionally by choosing not to advise its jurors as to events that would (or would not) follow their recommendation of a death sentence, as provided by the legal regime of the moment. Indeed, given the sentiments, expressed in Justice Marshall's *Ramos* dissent and *Caldwell* plurality, that information about postsentence procedures was *never* to go to the jury and given that the decision whether to provide such information had been described by the *Ramos* majority opinion and JUSTICE O'CONNOR's concurrence in *Caldwell* as a "policy choice" left to the States, the reasonable jurist may well have concluded that the most surely constitutional course, when confronted with a request to inform a jury about a defendant's parole eligibility, was silence.

Teague asks state-court judges to judge reasonably, not presciently. See *Stringer* v. *Black*, 503 U. S., at 244 (SOUTER, J., dissenting). In *Simmons*, the Court carved out an exception to the general rule described in *Ramos* by, for the first time ever, requiring that a defendant be allowed to inform the jury of postsentencing legal eventualities. A 1988 jurist's failure to predict this cannot, we think, be deemed unreasonable. Accordingly, the rule announced in *Simmons* was new, and petitioner may not avail himself of it unless the rule of *Simmons* falls within one of the exceptions to *Teague*'s bar.[3]

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[3] Our conclusion that the rule of *Simmons* was new finds support in the decisions of the state courts and the lower federal courts. See *Butler*, 494 U. S., at 415. By 1988, no state or federal court had adopted the rule of *Simmons*. In fact, both before and after *Skipper* v. *South Carolina*, 476 U. S. 1 (1986), several courts had upheld against constitutional challenge practices similar, if not identical, to that later forbidden in *Simmons*. See, *e. g.*, *Turner* v. *Bass*, 753 F. 2d 342, 354 (CA4 1985), rev'd on other grounds *sub nom. Turner* v. *Murray*, 476 U. S. 28 (1986); *O'Bryan* v. *Estelle*, 714 F. 2d 365, 389 (CA5 1983), cert. denied *sub nom. O'Bryan* v. *McKaskle*, 465 U. S. 1013 (1984); *King* v. *Lynaugh*, 850 F. 2d 1055, 1057 (CA5 1988) (en banc), cert. denied, 488 U. S. 1019 (1989); *Peterson* v. *Murray*, 904 F. 2d 882, 886–887 (CA4), cert. denied, 498 U. S. 992 (1990); *Knox* v. *Collins*, 928 F. 2d 657, 660, 662 (CA5 1991); see also *Turner* v. *Commonwealth*, 234 Va. 543, 551–552, 364 S. E. 2d 483, 487–488, cert. denied, 486 U. S. 1017 (1988); *Mueller* v. *Commonwealth*, 244 Va. 386, 408–409, 422 S. E. 2d 380, 394 (1992), cert. denied, 507 U. S. 1043 (1993). In addition, several of the courts to consider the question have, along with the Fourth Circuit in this case, concluded that the rule of *Simmons* was new. See, *e. g.*, *Johnson* v. *Scott*, 68 F. 3d 106, 111–112, n. 11 (CA5 1995), cert. denied *sub nom. Johnson* v. *Johnson*, 517 U. S. 1122 (1996); *Mueller* v. *Murray*, 252 Va. 356, 365–366, 478 S. E. 2d 542, 548 (1996); *Commonwealth* v.

B

Petitioner contends that, even if it is new, the rule of *Simmons* falls within the second exception to *Teague*, which permits retroactive application of " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Graham*, 506 U. S., at 478 (quoting *Teague*, 489 U. S., at 311). Petitioner describes the "practice condemned in *Simmons*" as a "shocking one." Brief for Petitioner 33. The rule forbidding it, we are told, is "on par" with *Gideon* v. *Wainwright*, 372 U. S. 335 (1963)—which we have cited as an example of the sort of rule falling within *Teague*'s second exception, see *Saffle*, 494 U. S., at 495—because "both cases rest upon this Court's belief that certain procedural protections are essential to prevent a miscarriage of justice," Brief for Petitioner 35 (citations omitted). We disagree.[4] Unlike the sweeping rule of *Gideon*, which established an affirmative right to counsel in all felony cases, the narrow right of rebuttal that *Simmons* affords to defendants in a limited class of capital cases has hardly " ' "alter[ed] our understanding of the *bedrock procedural elements*" ' essential to the fairness of a proceeding." *Sawyer*, 497 U. S., at 242 (quoting *Teague*, *supra*, at 311, quoting, in turn, *Mackey* v. *United States*, 401 U. S. 667, 693 (1971) (Harlan, J., concurring in judgments in part and dissenting in part) (emphasis in *Teague*)). *Simmons* possesses little of the "watershed" character envisioned by *Teague*'s second exception.

Christy, 540 Pa. 192, 215–217, 656 A. 2d 877, 888–889, cert. denied, 516 U. S. 872 (1995).

[4] It is by no means inevitable that, absent application of the rule of *Simmons*, "miscarriage[s] of justice" will occur. We note, for example, that at the time he was sentenced to death for Helen Schartner's murder, petitioner had already been convicted of a murder committed while he was in prison. Informing his sentencing jury that petitioner would spend the rest of his days in prison would not, then, necessarily have rebutted an argument that he presented a continuing danger.

IV

For the reasons stated herein, the judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

Although petitioner's guilt has been established, it is undisputed that the conduct of the sentencing hearing that led to the imposition of his death penalty violated the Due Process Clause of the Fourteenth Amendment. His eligibility for a death sentence depended on the prosecutor's ability to convince the jury that there was a "probability that he would commit criminal acts of violence that would constitute a continuous threat to society." App. 69. In support of his argument to the jury that nothing short of the death penalty would be sufficient, the prosecutor emphasized petitioner's misconduct when he was "outside of the prison system," *id.*, at 61,[1] and stated that petitioner had "forfeited his right to live among us," *id.*, at 66. Nevertheless, the trial court refused to allow petitioner to advise the jury that if the death sentence were not imposed, he would be imprisoned for the rest of his life without any possibility of parole. Thus, he was denied the opportunity to make a fair response to the prosecutor's misleading argument about the future danger that he allegedly posed to the community.

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[1] During his closing statement at the sentencing proceeding, the prosecutor observed: "Isn't it interesting that he is only able to be outside of the prison system for a matter of months to a year and a half before something has happened again?" App. 61. And, after drawing out the parallels between the Virginia murder and a kidnaping and robbery for which petitioner had been convicted in Florida some years earlier, the prosecutor said: "We are a society of fair, honest people who believe in our government and who believe in our justice system; and I submit to you there was a failure in the Florida criminal justice system for paroling this man when they did." *Id.*, at 64.

The prosecutor concluded his argument by saying: "[Y]ou may still sentence him to life in prison, but I ask you ladies and gentlemen[,] in a system, in a society that believes in its criminal justice system and its government, what does this mean? . . . [A]ll the times he has committed crimes before and been before other juries and judges, no sentence ever meted out to this man has stopped him. Nothing has stopped him, and nothing ever will except the punishment that I now ask you to impose." *Id.*, at 66.

Our virtually unanimous decision in *Simmons* v. *South Carolina*, 512 U. S. 154 (1994),[2] recognized the fundamental unfairness of the restrictive procedure followed in this case. As JUSTICE O'CONNOR's opinion, which has been treated as expressing the narrowest ground on which the decision rested, explained:

> " 'Capital sentencing proceedings must of course satisfy the dictates of the Due Process Clause,' *Clemons* v. *Mississippi*, 494 U. S. 738, 746 (1990), and one of the hallmarks of due process in our adversary system is the defendant's ability to meet the State's case against him. Cf. *Crane* v. *Kentucky*, 476 U. S. 683, 690 (1986). In capital cases, we have held that the defendant's future dangerousness is a consideration on which the State may rely in seeking the death penalty. See *California* v. *Ramos*, 463 U. S. 992, 1002–1003 (1983). But '[w]here the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, . . . the elemental due process requirement that a defendant not be sentenced to death "on the basis of information which he had no opportunity to deny or explain" [requires that the defendant be afforded an opportunity to introduce evidence on this point].' *Skipper* v. *South Carolina*, 476 U. S. 1, 5, n. 1 (1986), quoting *Gardner* v. *Florida*, 430 U. S. 349, 362 (1977) (plurality opinion); see

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[2] In the years following our decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972) *(per curiam)*, unanimous Court opinions in capital cases have been virtually nonexistent. The decision in *Simmons* v. *South Carolina*, 512 U. S. 154 (1994), came closer than most, for only two Justices dissented.

> also 476 U. S., at 9–10 (Powell, J., concurring in judgment)." *Id.*, at 175 (opinion concurring in judgment).

Thus, this case is not about whether petitioner was given a fair sentencing hearing; instead, the question presented is whether, despite the admittedly unfair hearing, he should be put to death because his trial was conducted before *Simmons* was decided. Because the Court regards the holding in *Simmons* as nothing more than a novel "court-made rule," *ante*, at 156, it rejects petitioner's plea. In my view, our decision in *Simmons* applied a fundamental principle that is as old as the adversary system itself, and that had been quite clearly articulated by this Court in two earlier opinions. Accordingly, I respectfully dissent.

I

My analysis begins where the majority tersely ends—with petitioner's contention that the rule in *Simmons* implicates "the fundamental fairness and accuracy of the criminal proceeding," *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990), and therefore should be retroactively applied even if it would constitute a "new" rule under *Teague* v. *Lane*, 489 U. S. 288, 307 (1989).

Our decision in *Teague* recognized two exceptions to the general rule of nonretroactivity. The relevant exception for our purposes establishes that "a new rule should be applied retroactively if it requires the observance of 'those procedures that . . . are "implicit in the concept of ordered liberty."'" *Ibid.* (quoting *Mackey* v. *United States*, 401 U. S. 667, 693 (1971) (Harlan, J., concurring in judgments in part and dissenting in part), in turn quoting *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937)). In the opinion that provided the basis for the limitations on collateral review adopted in *Teague*, Justice Harlan emphasized the importance of protecting "bedrock procedural elements" that are "essential to the substance of a full hearing." *Mackey*, 401 U. S., at 693–694. We endorsed that view, with the caveat that this exception should be limited to those "procedures without which the likelihood of an accurate [determination of guilt or innocence] is seriously diminished." *Teague*, 489 U. S., at 313.[3]

Since *Teague* was decided, this Court has never found a rule so essential to the fairness of a proceeding that it would fall under this exception.[4] In my view, the right in *Simmons*—the right to respond to an inaccurate or misleading argument—is surely a bedrock procedural element of a full and fair hearing. As JUSTICE O'CONNOR recognized in her opinion in *Simmons*, this right to rebut the prosecutor's arguments is a "hallmar[k] of due process," 512 U. S., at 175 (opinion concurring in judgment). See also *id.*, at 174 (GINSBURG, J., concurring) ("This case is most readily resolved under a core requirement of due process, the right to be heard"). When a defendant is denied the ability to respond to the state's case against him, he is deprived of "his fundamental constitutional right to a fair opportunity to present a defense." *Crane* v. *Kentucky*, 476 U. S. 683, 687 (1986).

The Court today argues that *Simmons* defined only a "narrow right of rebuttal [for] defendants in a limited class of capital cases," *ante*, at 167, and therefore that the rule cannot be in that class of rules so essential to the accuracy of a criminal proceeding that they are excepted from *Teague*'s nonretroactivity principle.

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[3] Although *Teague* v. *Lane*, 489 U. S. 288 (1989), focused on the accuracy of a guilt-innocence determination, we have long recognized that sentencing procedures, as well as trials, must satisfy the dictates of the Due Process Clause, see, *e. g.*, *Clemons* v. *Mississippi*, 494 U. S. 738, 746 (1990), and that the unique character of the death penalty mandates special scrutiny of those procedures in capital cases. An unfair procedure that seriously diminishes the likelihood of an accurate determination that a convicted defendant should receive the death penalty rather than life without parole—that the defendant is "innocent of the death penalty," see *Sawyer* v. *Whitley*, 505 U. S. 333, 341–343 (1992)—is plainly encompassed by *Teague*'s exception.

[4] The most commonly cited example of a rule so fundamental that it would fit this category is the right to counsel articulated in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963).

The majority appears not to appreciate that the reason *Simmons*' holding applied directly to only a narrow class of capital defendants is because only a very few States had in place procedures that allowed the prosecutor to argue future dangerousness while at the same time prohibiting defendants from using "the only way that [they] can successfully rebut the State's case." 512 U. S., at 177 (O'CONNOR, J., concurring in judgment).[5] The prevailing rule in the States that provided a life-without-parole sentencing alternative required an instruction explaining that alternative to the jury.[6]

Although the majority relies on the limited impact of the *Simmons* rule to discount its importance, the broad consensus in favor of giving the jury accurate information in fact underscores the importance of the rule applied in *Simmons.* The rule's significance is further demonstrated by evidence of the effect that information about the life-without-parole alternative has on capital jury deliberations. For example, only 2 death sentences have been imposed in Virginia for crimes committed after January 1, 1995—whereas 10 were imposed in 1994 alone—and the decline in the number of death sentences has been attributed to the fact that juries in Virginia must now be informed of the life-without-parole alternative. See Green, Death Sentences Decline in Virginia, Richmond Times-Dispatch, Nov. 24, 1996,[7] p. A1. The consensus among the scholars and practitioners who drafted the Model Penal Code is that instructing the jury completely about the available sentencing alternatives is the best way to ensure accuracy in sentencing. See American Law Institute, Model Penal Code § 210.6 (1980). And we affirmed this basic point in *Beck* v. *Alabama,* 447 U. S. 625, 637 (1980), when we acknowledged that the likelihood that a jury would find an obviously guilty defendant eligible for the death penalty was significantly increased when an arguably more appropriate sentencing alternative was not available.

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[5] See *Simmons,* 512 U. S., at 168, n. 8.

[6] See *id.,* at 167, n. 7 (listing the States whose capital punishment schemes in one way or another require the jury to be informed that life without parole is either the only available alternative sentence or one of the options from which the jury is free to choose).

[7] See also, *e. g.,* Comment, Truth in Sentencing: The Prospective and Retroactive Application of *Simmons* v. *South Carolina,* 63 U. Chi. L. Rev. 1573 (1996); Eisenberg & Wells, Deadly Confusion: Juror Instructions in Capital Cases, 79 Cornell L. Rev. 1, 7–9 (1993) ("[J]urors who believe the alternative to death is a relatively short time in prison tend to sentence

Thus, even if the rule in *Simmons* could properly be viewed as a "new" rule, it is of such importance to the accuracy and fairness of a capital sentencing proceeding that it should be applied consistently to all prisoners whose death sentences were imposed in violation of the rule, whether they were sentenced before *Simmons* was decided or after. Moreover, to the extent that the fundamental principles underlying the rule needed explicit articulation by this Court, they clearly had been expressed well before petitioner's 1988 sentencing proceeding.

II

Distinguishing new rules from those that are not new under our post-*Teague* jurisprudence is not an easy task, but it is evident to me that if there is such a thing as a rule that is not new for these purposes, the rule announced in *Simmons* is one.

In *Gardner* v. *Florida,* 430 U. S. 349 (1977), a plurality of the Court concluded that the defendant's due process rights had been violated because his "death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Id.,* at 362. Nine years later, in *Skipper* v. *South Carolina,* 476 U. S. 1 (1986), all

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to death"); Paduano & Smith, Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty, 18 Colum. Hum. Rts. L. Rev. 211 (1987).

nine Justices cited *Gardner,* with approval, as establishing the "elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.' *Gardner* v. *Florida,* 430 U. S. 349, 362 (1977)." 476 U. S., at 5, n. 1; see also *id.,* at 10–11 (Powell, J., concurring in judgment) ("The Court correctly concludes that the exclusion of the proffered testimony violated due process . . . . [P]etitioner's death sentence violates the rule in *Gardner*").

When the Court was presented with the facts in *Simmons,* it was no surprise that Justice Blackmun said that "[t]he principle announced in *Gardner* was reaffirmed in *Skipper,* and it compels our decision today." 512 U. S., at 164–165 (plurality opinion). Or that JUSTICE O'CONNOR quoted *Gardner* and *Skipper* for the proposition that "elemental due process" requires that a defendant must be allowed to answer a prosecutor's "prediction of future dangerousness" with "evidence on this point." 512 U. S., at 175 (internal quotation marks omitted).

Today, however, the Court seeks to revise the import of this line of cases. The first misstep in the Court's analysis is its treatment of *Gardner.* The majority makes much of the fact that the lead opinion was joined by only three Justices,[8] and instead of accepting the plurality's due process analysis as the rule of *Gardner,* the Court takes Justice White's concurring opinion, which was grounded in the Eighth Amendment, as expressing the holding of the case. The Court's reading of *Gardner* ignores the fact that Justice White himself squarely adopted the due process holding of

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[8] The Court ignores the fact that Justice Brennan and Justice Marshall agreed with the plurality's conclusion that sentencing a defendant based on information he was not permitted to deny or explain violated due process, but refused to join the judgment insofar as it permitted further proceedings that could lead to another death sentence. See *Gardner* v. *Florida,* 430 U. S. 349, 364–365 (1977) (opinion of Brennan, J.); *id.,* at 365 (Marshall, J., dissenting).

Gardner in his opinion for the Court in *Skipper*. Although his opinion accepted Skipper's argument that the exclusion of evidence of his good behavior in prison at the sentencing hearing violated the Eighth Amendment requirement that the jury be allowed to consider all relevant mitigating evidence, Justice White went out of his way to add a footnote endorsing the *Gardner* plurality's statement of the law and emphasizing that this "elemental due process requirement" provided an even more basic justification for the Court's holding.[9] Moreover, in his opinion concurring in the judgment in *Skipper*, Justice Powell, joined by the Chief Justice and then-JUSTICE REHNQUIST, rejected the mitigating evidence rationale, relying instead on "the rule in *Gardner*." 476 U. S., at 10–11. Thus, in *Skipper*, all nine Justices then serving on the Court endorsed *Gardner*'s holding that due process was violated when a sentencing determination rested on information that a defendant was not permitted to explain or deny. See also *Clemons* v. *Mississippi*, 494 U. S. 738, 746 (1990) (citing *Gardner* for the proposition that "[c]apital sentencing proceedings must of course satisfy the dictates of the Due Process Clause"); *Simmons*, 512 U. S., at 180 (SCALIA, J., dissenting) (quoting *Skipper* and *Gardner* as "indicat[ing] that petitioner's due process rights would be violated if he was 'sentenced to death "on the basis of information which he had no opportunity to deny or explain,"'" but concluding that the petitioner could not show that his sentence violated this principle).

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[9] "Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, it is not only the rule of *Lockett* [v. *Ohio*, 438 U. S. 586 (1978),] and *Eddings* [v. *Oklahoma*, 455 U. S. 104 (1982),] that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.' *Gardner* v. *Florida*, 430 U. S. 349, 362 (1977)." *Skipper* v. *South Carolina*, 476 U. S. 1, 5, n. 1 (1986).

As to *Skipper,* the only distinction the majority is able to draw between that case and *Simmons* is that the defendant in *Skipper* sought to introduce "evidence of his past behavior," while Simmons wished "an opportunity to describe the extant legal regime." *Ante,* at 162. This distinction is simply not enough to make the rule in *Simmons* "new." In both cases, the prosecution was seeking to mislead the jury with an argument that excluded facts essential to the defendant's actual circumstances. The rule in *Skipper* and *Gardner*—that a defendant must be allowed an opportunity to rebut arguments put forward by the prosecution—simply cannot turn on whether his rebuttal relies on the fact that he is ineligible for parole or on the fact that he is a model prisoner.

The two cases on which the majority relies to argue that a reasonable jurist in 1988 would have thought that petitioner did not have a right to rebut the prosecutor's future dangerousness arguments simply provide further support for the conclusion that *Simmons* did not announce a new rule of law. In both *California* v. *Ramos,* 463 U. S. 992 (1983), and *Caldwell* v. *Mississippi,* 472 U. S. 320 (1985), the Court focused its analysis on whether the information being presented (or withheld) in a sentencing determination permitted accurate and informed decisionmaking on the part of the sentencer.

In *Ramos,* the Court held that California's capital sentencing procedure—in which the judge was required to inform the jury that it could sentence the defendant to death or to life without parole, and then to provide the further instruction that the Governor could commute a life sentence without parole—was not constitutionally infirm. (This further instruction is, of course, only relevant when the jury has first been advised that the alternative to the death sentence is the option that was concealed from the jury in *Simmons* and in this case.) The Court correctly explained that the instruction on commutation of the life sentence was relevant to the issue of future dangerousness, 463 U. S., at 1003, and consistent with the rule of *Gardner* because it provided the jury with accurate information and did not preclude the defendant from offering argument or evidence regarding the Governor's power to commute a life sentence. 463 U. S., at 1004. In a comment that anticipated the precise holding in *Simmons,* the Court concluded that the instruction under review "corrects a misconception and supplies the jury with accurate information for its deliberation in selecting an appropriate sentence." 463 U. S., at 1009.[10]

While the *Ramos* Court concluded that a State *could* constitutionally require trial judges to inform sentencing juries about the possibility of commutation of a life sentence, the Court did not hold that a State was constitutionally compelled to do so. The majority today, *ante,* at 163–164, suggests that the *Ramos* Court's endorsement of that option—involving a choice between two nonmisleading instructions, one mentioning and the other not mentioning the remote "possibility" of parole—might have led reasonable state judges to conclude that they could allow juries to be misled on the future dangerousness issue by concealing entirely the legal certainty of parole *impossibility.* But the general rule applied in *Ramos* simply permits state courts to give accurate instructions that will prevent juries from being misled about sentencing options in capital cases. In order to decide *Simmons* correctly, there was no need to "carv[e] out an exception," *ante,* at 166, from that rule.

The Court's reading of *Caldwell* is equally unpersuasive. In that case, the prosecutor had urged the jury not to view itself as finally determining whether the defendant would die, because the death sentence was subject to appellate review. As JUSTICE O'CONNOR's controlling opinion explained, the prosecutor's remarks were improper "because they were inaccurate and misleading in a manner that diminished the jury's sense of responsibility." 472 U. S., at 342. Because Justice Marshall's plurality opinion suggested that any comment on appellate review was "wholly irrelevant" to the sentencing determination, *id.*, at 336, the Court today suggests that state judges might reasonably have concluded "that information about postsentence procedures was *never* to go to the jury." *Ante,* at 165. Apart from the fact that an instruction describing a sentencing alternative does not relate to "postsentence procedures," I see no basis for assuming that concerns about describing the process of appellate review to a jury might have anything to do with the necessity for providing the jury with accurate information about sentencing options when the prosecutor makes the misleading argument that the death penalty is the only way to prevent a defendant's future dangerousness "outside of the prison system."

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[10] The Court cited with approval the provision of the Model Penal Code recommending that the jury be advised of "the nature of the sentence of imprisonment that may be imposed, including its implication with respect to possible release upon parole, if the jury verdict is against sentence of death." *California* v. *Ramos,* 463 U. S., at 1009, n. 23 (quoting American Law Institute, Model Penal Code § 210.6 (Prop. Off. Draft 1962)).

The Court has consistently, and appropriately, shown a particular concern for procedures that protect the accuracy of sentencing determinations in capital cases.[11] Today, the majority discards this concern when it relies on a nonexistent tension between *Gardner* and *Skipper* on the one hand and *Ramos* and *Caldwell* on the other to justify its refusal to apply the rule in *Simmons* to this case.

I respectfully dissent.

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[11] See *Gardner,* 430 U. S., at 357–358 ("From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion"). See also, *e. g., California* v. *Ramos,* 463 U. S. 992, 998–999 (1983); *Beck* v. *Alabama,* 447 U. S. 625, 637–638 (1980).

KLEHR ET UX. *v.* A. O. SMITH CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 96–663. Argued April 21, 1997—Decided June 19, 1997

The Racketeer Influenced and Corrupt Organizations Act (RICO) makes it a crime "to conduct" an "enterprise's affairs through a pattern of racketeering activity." 18 U. S. C. § 1962(c). A "pattern" requires at least two acts of racketeering activity, the last of which occurred within 10 years after the commission of a prior act. § 1961(5). A person injured by a violation of RICO's criminal provisions may recover treble damages and attorney's fees in a civil RICO action, § 1964(c), but civil actions are subject to the 4-year limitations period in § 4B of the Clayton Act—the statute of limitations governing private civil antitrust actions seeking treble damages, *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U. S. 143, 156. The petitioners Klehr filed a civil RICO action against respondents (hereinafter Harvestore) in August 1993, claiming that their injury began in 1974, when they purchased a Harvestore-brand silo for their dairy farm based on Harvestore's false representations that it would prevent moldy and fermented cattle feed, thereby producing healthier cows, more milk, and higher profits. In fact, the feed became moldy and fermented and both milk production and profits declined. They added that Harvestore committed other predicate acts, consisting of repeated misrepresentations to the Klehrs and to others, and sales to others, over many years. Harvestore moved to dismiss on the ground that the limitations period had run because the Klehrs' claim had accrued before August 1989, and no special legal doctrine applied to toll the running of the limitations period or to estop Harvestore from asserting a statute of limitations defense. The Klehrs responded that because Harvestore had taken affirmative steps to conceal its fraud, they did not become sufficiently suspicious to investigate the silo and to discover the mold until 1991. The District Court found the Klehrs' lawsuit untimely. The Eighth Circuit affirmed, holding that a civil RICO action accrues as soon as the plaintiff discovers, or reasonably should discover, both the existence and source of his injury and that the injury is part of a pattern; and that the Klehrs had suffered one single, continuous injury sometime in the 1970's which they should have discovered well before August 1989. The Circuit refused to toll the running of the statute on a "fraudulent concealment" theory because, among other things, the Klehrs had not been sufficiently diligent in discovering their claim. Like the Eighth Circuit, some Circuits apply an "injury and pattern discovery" civil RICO accrual rule; others apply an "injury discovery" rule, under which the statute begins to run when the plaintiff knows or reasonably should know of his injury; and the Third Circuit applies a "last predicate act" rule, under which the statute begins to run when the plaintiff knows or reasonably should know of the last injury or last predicate act in the pattern, whether or not the plaintiff himself has suffered any injury from that last act.

Held:

1. The "last predicate act" rule is not an appropriate interpretation of RICO. Pp. 186–193.

(a) Only the Third Circuit's accrual rule can help the Klehrs. For purposes of assessing its lawfulness, this Court assumes that the rule means that as long as Harvestore committed one predicate act within the limitations period, the Klehrs can recover, not just for any harm caused by that late-committed act, but for all the harm caused by all the acts that make up the total "pattern"; that the Klehrs can show at least one such late-committed act; and that they are knowledgeable about the pattern. Pp. 186–187.

(b) The rule is unlawful for two reasons. First, because a series of predicate acts can continue indefinitely, it creates a longer limitations period than Congress could have contemplated, in conflict with a basic objective—repose—underlying limitations periods. See, *e. g., Wilson* v. *Garcia,* 471 U. S. 261, 271. Civil RICO has no compensatory objective warranting so significant an extension of the limitations period, and civil RICO's further purpose—encouraging potential private plaintiffs diligently to investigate, see *Malley-Duff,* 483 U. S., at 151—suggests the contrary. RICO's criminal limitations period, which runs from the most recent predicate act, does not provide an apt analogy for civil RICO actions. *Id.,* at 155–156. Second, the rule is inconsistent with § 4B of the Clayton Act, under which "a cause of action accrues . . . when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 401 U. S. 321, 338. The Clayton Act analogy is generally useful in civil RICO cases, since Congress consciously patterned civil RICO after that Act, and since, by the time civil RICO was enacted, the Clayton Act's accrual rule was well established. The Clayton Act accrual rule may not apply without modification in every civil RICO case. However, in this case the petitioners knew of the facts underlying their cause of action, and thus the Clayton Act rule makes clear precisely where, and how, the Third Circuit's rule goes too far. The Klehrs invoke the "separate accrual" civil RICO rule adopted by some Circuits, which is similar to the "continuing violation" doctrine in antitrust, in that the commission of a separate, new predicate act within the 4-year limitations period permits a plaintiff to recover for the additional damages that act caused. Under the separate accrual rule, however, the plaintiff cannot use an independent, new act as a bootstrap to recover for injuries caused by other predicate acts that took place outside the limitations period. See, *e. g., Grimmett* v. *Brown,* 75 F. 3d 506, 513. Thus acts taking place after August 1989 do not help the Klehrs, for they have not shown any additional damages, and the Third Circuit rule is incorrect insofar as it would allow the presence of a new act to help them recover for injuries caused by pre-1989 acts. This case also does not present the kind of special circumstance in which courts might permit plaintiffs to recover for injuries that were so speculative or unprovable at the time of Harvestore's unlawful act that starting the limitations period when the act first caused injury would have left the Klehrs without relief. *Zenith, supra,* at 339–340, distinguished. Pp. 187–191.

(c) Resolving the conflicts among the various discovery accrual rules used by other Circuits would not affect the outcome of this case, as the petitioners' civil RICO claim is barred under the most liberal accrual rule, as applied by the Eighth Circuit. There is no clear or obvious error in the Eighth Circuit's application of its "injury and pattern discovery" rule and it is beyond the scope of the writ to reconsider whether the Klehrs reasonably should have discovered the silo's flaws before 1989. Pp. 191–193.

2. A plaintiff who is not reasonably diligent in trying to discover his civil RICO cause of action may not rely upon "fraudulent concealment" to toll the limitations period or to estop a defendant from asserting a limitations defense. This requirement is uniformly supported by relevant authority in the related antitrust context, where the "fraudulent concealment" doctrine is invoked fairly often. And while those courts that do not require "reasonable diligence" in contexts other than antitrust cases have said that the doctrine is concerned only with defendants' behavior, that is not the case with respect to antitrust or civil RICO. In both of these contexts private civil actions seek not only to compensate victims but also to encourage those victims diligently to investigate and thereby to uncover unlawful activity. See *Malley-Duff, supra,* at 151. The Klehrs' fact-based question whether the Eighth Circuit properly applied the "due diligence" requirement to the evidentiary materials before it is beyond the scope of this Court's writ. Pp. 193–196.

87 F. 3d 231, affirmed.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, SOUTER, and GINSBURG, JJ., joined, and in which SCALIA and THOMAS, JJ., joined as to Part III. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which THOMAS, J., joined, *post*, p. 196.

Charles A. Bird argued the cause for petitioners. With him on the briefs were *Mary R. Vasaly*, *Michael C. McCarthy*, and *Malcolm McCune.*

Bruce J. Ennis, Jr., argued the cause for respondents. With him on the brief were *Frederick W. Morris*, *Blake Shepard, Jr.*, *Jeffrey E. Grell*, *Nory Miller*, and *Kathleen M. Massey.**

JUSTICE BREYER delivered the opinion of the Court.

The petition in this case asked us to consider two aspects of "statute of limitations" law. One concerns the date upon which a civil action accrues under the Racketeer Influenced and Corrupt Organizations Act and the limitations period starts to run. The other concerns "fraudulent concealment," a doctrine that extends the time for a plaintiff to file suit. In respect to the first, we focus upon, and disapprove, an accrual rule followed in the Third Circuit called the "last predicate act" rule. In respect to the second, we hold that a plaintiff may not rely upon "fraudulent concealment" unless he has been reasonably diligent in trying to discover his cause of action.

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*Briefs of *amici curiae* urging reversal were filed for the National Association of Securities and Commercial Law Attorneys by *Kevin P. Roddy*, *G. Robert Blakey*, *Patrick E. Cafferty*, *Bryan L. Clobes*, and *Jonathan W. Cuneo;* and for Plaintiffs' Executive Committee, MDL No. 1069, et al. by *Richard B. McNamara*, *Gregory A. Holmes*, *Stephanie A. Bray*, *Martin J. Oberman*, *Alice W. Ballard*, *Michael M. Baylson*, *Charles Barnhill, Jr.*, *Judson Miner*, and *Edward R. Garvey.*

Briefs of *amici curiae* urging affirmance were filed for the National Association of Manufacturers by *Alfred W. Cortese, Jr.*, *Daniel I. Prywes*, *Michael F. Wasserman*, *Jan S. Amundson*, and *Quentin Riegel;* for the National Hockey League by *Michael A. Cardozo*, *Steven C. Krane*, and *William L. Daly;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp.*

Philip Allen Lacovara, *Evan M. Tager*, and *Phillip E. Stano* filed a brief for the American Council of Life Insurance et al. as *amici curiae.*

I

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. §§ 1961–1968, among other things, makes it a crime "to conduct" an "enterprise's affairs through a pattern of racketeering activity." § 1962(c). The phrase "racketeering activity" is a term of art defined in terms of activity that violates other laws, including more than 50 specifically mentioned federal statutes, which forbid, for example, murder-for-hire, extortion, and various kinds of fraud. § 1961(1). The word "pattern" is also a term of art defined to require "at least two acts of racketeering activity, . . . the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity." § 1961(5).

A special RICO provision—commonly known as civil RICO—permits "[a]ny person injured in his business or property by reason of a violation" of RICO's criminal provisions to recover treble damages and attorney's fees. § 1964(c). RICO does not say what limitations period governs the filing of civil RICO claims. But in *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U. S. 143, 156 (1987), this Court held that civil RICO actions are subject to the 4-year limitations period contained in § 4B of the Clayton Act (Antitrust), as added by 69 Stat. 283, and as amended, 15 U. S. C. § 15b—the statute of limitations that governs private civil antitrust actions seeking treble damages.

Marvin and Mary Klehr, the petitioners here, are dairy farmers. They filed this civil RICO action on August 27, 1993, claiming that A. O. Smith Corporation and A. O. Smith Harvestore Products, Inc. (whom we shall simply call "Harvestore"), had committed several acts of mail and wire fraud, 18 U. S. C. §§ 1341, 1343, thereby violating RICO and causing them injury. Their injury, they said, began in 1974, when Harvestore sold them a special "Harvestore" brand silo, which they used for storing cattle feed. The Klehrs alleged that they bought the silo in reliance on Harvestore's representations, made through advertisements and a local dealer, that the silo would limit the amount of oxygen in contact with the silage, thus preventing moldy and fermented feed, and thereby producing healthier cows, more milk, and higher profits. The representations, they claim, were false; the silo did not keep oxygen away from the feed, the feed became moldy and fermented, the cows ate the bad feed, and milk production and profits went down. They add that Harvestore committed other acts—consisting primarily of additional representations made to them and to others and sales made to others—over a period of many years after 1974.

Harvestore, pointing out that the Klehrs had filed suit almost 20 years after they had bought the silo, moved to dismiss the lawsuit on the ground that the limitations period had long since run. The Klehrs could not file suit, Harvestore said, unless their claim had accrued within the four years prior to filing, *i. e.*, after August 25, 1989, or unless some special legal doctrine nonetheless tolled the running of the limitations period or estopped Harvestore from asserting a statute of limitations defense. See *Holmberg* v. *Armbrecht*, 327 U. S. 392, 396–397 (1946); *Bailey* v. *Glover*, 21 Wall. 342, 349–350 (1875); *Cada* v. *Baxter Healthcare Corp.*, 920 F. 2d 446, 450–451 (CA7 1990), cert. denied, 501 U. S. 1261 (1991).

The Klehrs responded by producing evidentiary material designed to support a legal justification for the late filing. Essentially they claimed that Harvestore had covered up its fraud—preventing them from noticing the silo's malfunction—for example, by means of an unloading device that hid the mold by chopping up the feed instantly as it emerged; through continued dealer misrepresentations; with advertisements that tried to convince farmers that warm, brown, molasses-smelling feed was not fermented feed, but good feed; and even by hanging on the silo itself a plaque that said:

"DANGER
DO NOT ENTER
NOT ENOUGH OXYGEN
TO SUPPORT LIFE"

Not until 1991, say the Klehrs, did they become sufficiently suspicious to investigate the silo, at which time, by opening the silo wall and chopping through the feed with an ice chisel, they discovered " 'mold hanging all over the silage.' " Brief for Petitioners 16.

The District Court, after examining the Klehrs' evidence, found their lawsuit untimely. The Eighth Circuit affirmed the dismissal, and said that a civil RICO action accrues

> " 'as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern.' " 87 F. 3d 231, 238 (1996) (quoting *Association of Commonwealth Claimants* v. *Moylan*, 71 F. 3d 1398, 1402 (CA8 1995)).

After examining the Klehrs' evidence *de novo*, the Circuit held that they failed to satisfy the standard. It said they had suffered "one single, continuous injury . . . sometime in the 1970s"; and that they should have discovered "the existence and source of [their] injury," as well as any related "pattern," well before August 1989. 87 F. 3d, at 239. The Circuit refused to find "fraudulent concealment" because, among other things, the Klehrs had not been sufficiently "diligen[t]." *Id.*, at 238, 239, n. 11.

We granted certiorari in this case to consider the Klehrs' claim in light of a split of authority among the Courts of Appeals. Two other Circuits, like the Eighth Circuit here, have applied forms of an "injury and pattern discovery" civil RICO accrual rule. *Bivens Gardens Office Building, Inc.* v. *Barnett Bank*, 906 F. 2d 1546, 1554–1555 (CA11 1990), cert. denied, 500 U. S. 910 (1991); *Bath* v. *Bushkin, Gaims, Gaines & Jonas*, 913 F. 2d 817, 820 (CA10 1990). Other Circuits have applied forms of an "injury discovery" rule, *i. e.*, without the "pattern." See *Grimmett* v. *Brown*, 75 F. 3d 506, 511 (CA9 1996), cert. dism'd as improvidently granted, 519 U. S. 233 (1997); *McCool* v. *Strata Oil Co.*, 972 F. 2d 1452, 1464–1465 (CA7 1992); *Rodriguez* v. *Banco Central Corp.*, 917

F. 2d 664, 665–666 (CA1 1990); *Bankers Trust Co.* v. *Rhoades,* 859 F. 2d 1096, 1102 (CA2 1988), cert. denied, 490 U. S. 1007 (1989); *Pocahontas Supreme Coal Co.* v. *Bethlehem Steel Corp.,* 828 F. 2d 211, 220 (CA4 1987); see also *Riddell* v. *Riddell Washington Corp.,* 866 F. 2d 1480, 1489–1490 (CADC 1989) (assuming, but not deciding, that injury discovery rule applies). One court, the Third Circuit, has applied a "last predicate act" rule, which we shall discuss below. We also agreed to decide the Klehrs' argument that "reasonable diligence" is not a necessary component of the doctrine of "fraudulent concealment."

For reasons we shall describe, we affirm the judgment of the Court of Appeals.

II

A

We shall first discuss the Third Circuit's accrual rule—the "last predicate act" rule—for it is the only accrual rule that can help the Klehrs. Like the Eighth Circuit, the Third Circuit believes that the limitations period starts to run when a plaintiff knew or should have known that the RICO claim (including a "pattern of racketeering activity") existed, but the Third Circuit has added an important exception, which it states as follows:

> "[If], as a part of the same pattern of racketeering activity, there is further injury to the plaintiff or further predicate acts occur, . . . the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity. The last predicate act need not have resulted in injury to the plaintiff but must be part of the same pattern." *Keystone Ins. Co.* v. *Houghton,* 863 F. 2d 1125, 1130 (1988).

For purposes of assessing the rule's lawfulness, we assume, as do the Klehrs, that this rule means that as long as

Harvestore committed one predicate act within the limitations period (*i. e.*, the four years preceding suit), the Klehrs can recover, not just for any added harm caused them by that late-committed act, but for all the harm caused them by all the acts that make up the total "pattern." We also assume that they can show at least one such late-committed act. Finally, we note that the point of difference between the Third Circuit and the other Circuits has nothing to do with the plaintiff's state of mind or knowledge. It concerns only the accrual consequences of a late-committed act. Consequently, we can consider the merits of the rule on the simplifying assumption that the plaintiff is perfectly knowledgeable.

We conclude that the Third Circuit's rule is not a proper interpretation of the law. We have two basic reasons. First, as several other Circuits have pointed out, the last predicate act rule creates a limitations period that is longer than Congress could have contemplated. Because a series of predicate acts (including acts occurring at up to 10-year intervals) can continue indefinitely, such an interpretation, in principle, lengthens the limitations period dramatically. It thereby conflicts with a basic objective—repose—that underlies limitations periods. See *Wilson* v. *Garcia*, 471 U. S. 261, 271 (1985) (citing *Adams* v. *Woods*, 2 Cranch 336, 342 (1805)); *Crown, Cork & Seal Co.* v. *Parker*, 462 U. S. 345, 352 (1983). Indeed, the rule would permit plaintiffs who know of the defendant's pattern of activity simply to wait, "sleeping on their rights," *ibid.*, as the pattern continues and treble damages accumulate, perhaps bringing suit only long after the "memories of witnesses have faded or evidence is lost," *Wilson, supra*, at 271. We cannot find in civil RICO a compensatory objective that would warrant so significant an extension of the limitations period, and civil RICO's further purpose—encouraging potential private plaintiffs diligently to investigate, see *Malley-Duff*, 483 U. S., at 151—suggests the contrary.

We recognize that RICO's criminal statute of limitations runs from the last, *i. e.*, the most recent, predicate act. But there are significant differences between civil and criminal RICO actions, and this Court has held that criminal RICO does not provide an apt analogy. *Id.*, at 155–156 (declining to apply criminal RICO's 5-year statute of limitations to civil RICO actions and noting "competing equities unique to civil RICO actions or, indeed, any other federal civil remedy").

Second, the Third Circuit rule is inconsistent with the ordinary Clayton Act rule, applicable in private antitrust treble damages actions, under which "a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U. S. 321, 338 (1971); *Connors* v. *Hallmark & Son Coal Co.*, 935 F. 2d 336, 342, n. 10 (CADC 1991); 1 C. Corman, Limitation of Actions § 6.5.5.1, p. 449 (1991) (hereinafter Corman); 2 P. Areeda & H. Hovenkamp, Antitrust Law ¶ 338b, p. 145 (rev. ed. 1995) (hereinafter Areeda). We do not say that a pure injury accrual rule always applies without modification in the civil RICO setting in the same way that it applies in traditional antitrust cases. For example, civil RICO requires not just a single act, but rather a "pattern" of acts. Furthermore, there is some debate as to whether the running of the limitations period depends on the plaintiff's awareness of certain elements of the cause of action. As we said earlier, however, for purposes of evaluating the Third Circuit's rule we can assume *knowledgeable* parties. Hence the special problems associated with a discovery rule, see Part II–B, *infra*, are not at issue. And we believe, in these circumstances, the Clayton Act analogy is helpful.

In *Malley-Duff*, this Court indicated why the analogy is useful. It concluded

> "that there is a need for a uniform statute of limitations for civil RICO, that the Clayton Act clearly provides a far closer analogy than any available state statute, and

> that the federal policies that lie behind RICO and the practicalities of RICO litigation make the selection of the 4-year statute of limitations for Clayton Act actions . . . the most appropriate limitations period for RICO actions." 483 U. S., at 156 (citing 15 U. S. C. § 15b).

The Court left open the accrual question. But it did not rule out the use of a Clayton Act analogy. As the Court has explained, Congress consciously patterned civil RICO after the Clayton Act. 483 U. S., at 150–151 (comparing 15 U. S. C. § 15(a) with 18 U. S. C. § 1964(c)); see also *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 489 (1985). And by the time civil RICO was enacted, the Clayton Act's accrual rule was well established. See *Crummer Co.* v. *DuPont*, 223 F. 2d 238, 247–248 (CA5), cert. denied, 350 U. S. 848 (1955); *Foster & Kleiser Co.* v. *Special Site Sign Co.*, 85 F. 2d 742, 750–751 (CA9 1936), cert. denied, 299 U. S. 613 (1937); *Bluefields S. S. Co.* v. *United Fruit Co.*, 243 F. 1, 20 (CA3 1917).

The Clayton Act helps here because it makes clear precisely where, and how, the Third Circuit's rule goes too far. Antitrust law provides that, in the case of a "continuing violation," say, a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, "each overt act that is part of the violation and that injures the plaintiff," *e. g.*, each sale to the plaintiff, "starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times." 2 Areeda ¶ 338b, at 145 (footnote omitted); see also *Zenith, supra*, at 338; *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481, 502, n. 15 (1968); *DXS, Inc.* v. *Siemens Medical Systems, Inc.*, 100 F. 3d 462, 467 (CA6 1996). But the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period. *Zenith, supra*, at 338; *Pennsylvania Dental Assn.* v. *Medical Serv. Assn.*, 815 F. 2d 270, 278 (CA3), cert. denied, 484 U. S. 851 (1987); *Hennegan* v. *Pacifico Creative Serv., Inc.*, 787 F. 2d 1299, 1300 (CA9), cert. denied, 479 U. S. 886 (1986); *National Souvenir Center* v. *Historic Figures, Inc.*, 728 F. 2d 503, 509 (CADC), cert. denied *sub nom. C. M. Uberman Enterprises, Inc.* v. *Historic Figures, Inc.*, 469 U. S. 825 (1984); *Imperial Point Colonnades Condominium, Inc.* v. *Mangurian*, 549 F. 2d 1029, 1034–1035 (CA5 1977); *Crummer Co., supra*, 247–248. Cf. 2 Areeda ¶ 338b, at 149.

Similarly, some Circuits have adopted a "separate accrual" rule in civil RICO cases, under which the commission of a separable, new predicate act within a 4-year limitations period permits a plaintiff to recover for the additional damages caused by that act. But, as in the antitrust cases, the plaintiff cannot use an independent, new predicate act as a bootstrap to recover for injuries caused by other earlier predicate acts that took place outside the limitations period. See, *e. g., Grimmett*, 75 F. 3d, at 512–514; *McCool* v. *Strata Oil Co.*, 972 F. 2d, at 1465–1466, and n. 10; *Bivens Gardens Office Building, Inc.* v. *Barnett Bank*, 906 F. 2d, at 1552, n. 9; *State Farm Mut. Auto. Ins. Co.* v. *Ammann*, 828 F. 2d 4, 5 (CA9 1987) (Kennedy, J., concurring). But see *Bingham* v. *Zolt*, 66 F. 3d 553, 560 (CA2 1995) (citing *Bankers Trust*, 859 F. 2d, at 1103). Thus, the Klehrs may point to new predicate acts that took place after August 1989, such as sales to other farmers or the printing of new Harvestore advertisements. But that fact does not help them, for, as the Court of Appeals pointed out, they have not shown how any new act could have caused them harm over and above the harm that the earlier acts caused. 87 F. 3d, at 239. Nor can the presence of the new act help them recover for the injuries caused by pre-1989 acts, for it is in this respect that we find the Third Circuit's rule incorrect.

Petitioners also point to *Zenith*, a case in which this Court considered antitrust damages that were so "speculative" or "unprovable," 401 U. S., at 339, at the time of a defendant's unlawful act (and plaintiff's initial injury) that to follow the normal accrual rule (starting the limitations period at the point the act first causes injury) would have left the plaintiff without relief. This Court held that, in such a case, a claim for the injuries that had been speculative would accrue when those injuries occurred, even though the act that caused them had taken place more than four years earlier. *Id.*, at 339–340. This case does not help the petitioners here, however, for their injuries—the harm to their farm—have always been specific and calculable.

B

We recognize that our holding in Part II–A does not resolve other conflicts among the Circuits. For example, the Circuits have applied "discovery" accrual rules, which extend accrual periods for plaintiffs who could not reasonably obtain certain key items of information. The use of a discovery rule may reflect the fact that a high percentage of civil RICO cases, unlike typical antitrust cases, involve fraud claims. See *Sedima, supra,* at 499, n. 16 (most civil RICO claims involve underlying fraud offense); 1 A. Mathews, A. Weissman, & J. Sturc, Civil RICO Litigation, p. 1–6 (2d ed. 1992) (citing Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law 243 (1985)) (as of 1985, approximately 90% of civil RICO cases resulting in a published decision involved mail, wire, or securities fraud as a predicate offense); cf. *Connors,* 935 F. 2d, at 342 (federal courts generally apply discovery accrual rule when statute does not call for a different rule); 1 Corman § 6.5.5.1, at 449 (same). Moreover, different Circuits have applied discovery accrual rules that differ, one from the other, in important ways. Compare, *e. g., Bankers Trust, supra,* at 1103 (civil RICO cause of action accrues when the plaintiff discovers or should have discovered his injury), with 87 F. 3d, at 238 (civil RICO cause of action accrues when, in addition, plaintiff discovers or should have discovered the "source" of injury and a "pattern").

We further realize that, contrary to our assumption in Part II–A, *supra* (where we discussed a legal issue in respect to which knowledge was irrelevant), the Klehrs did claim that they lacked knowledge of the faulty silo—the "source" of their injury. But that particular "lack of knowledge" claim does not require us to consider the various "discovery rule" differences among the Circuits, because the Klehrs failed the "knowledge" test that favors them the most—the Eighth Circuit's "injury plus source plus pattern" rule. That rule would have found the Klehrs' action timely had it not been the case that the Klehrs reasonably "should have discovered" *all* of those elements prior to 1989. 87 F. 3d, at 239. If the Klehrs cannot fit their case through the Eighth Circuit's larger hole, they cannot squeeze it through a smaller one.

In addition, the major difference among the Circuits—whether a discovery rule includes knowledge about a "pattern"—is clearly not at issue here. Harvestore marketed and sold its "oxygen-limiting" silos for many years before the Klehrs purchased theirs, and the Klehrs have not claimed lack of knowledge of a "pattern." Nor has anyone argued any other legal differences among the Circuits' various tests that would affect the outcome in this case.

In these circumstances, we believe we should not consider differences among the various discovery accrual rules used by the Circuits. The legal questions involved may be subtle and difficult. Compare *id.*, at 238 (claim accrues with discovery of existence *and source* of injury, plus pattern), with *Bivens Gardens, supra,* at 1554 (claim accrues with discovery of injury and pattern); see also *Cada,* 920 F. 2d, at 451 (describing differences among various discovery rules and doctrines of "equitable tolling" and "equitable estoppel"). And the facts of this case do not force focused argument as to how the traditional Clayton Act "injury" accrual rule, principles of equitable tolling, and doctrines of equitable estoppel should interact in circumstances where the application of one, or another, of these different limitations doctrines would make a significant legal difference. To say this is not, as the concurrence claims, to advocate a "mix-and-match" statute of limitations theory. *Post,* at 200, n. 3. Rather, it is to recognize that the Clayton Act's express statute of limitations does not necessarily provide all the answers. We shall, at the very least, wait for a case that clearly presents these or related issues, providing an opportunity for full argument, before we attempt to resolve them.

Finally, the Klehrs have asked us to review the Eighth Circuit's application of its rule in this case. Doing so would involve examining an evidentiary record of several thousand pages to determine the validity of the independent conclusion of each of two lower courts that the Klehrs should reasonably have discovered the silo's flaws before 1989 (and that a reasonable factfinder could not conclude to the contrary). That conclusion is highly fact based, depending not only upon how much mold the Klehrs noticed in their silage and when, but also upon such matters as the effect of the Klehrs' failure to consult the herd performance records they were continuously sent, and whether their having done so would have led them to tell veterinarians a more revealing story, to question Harvestore's representatives more fully, or to investigate the silo sooner. See 87 F. 3d, at 234. We have no reason to believe that there is any very obvious or exceptional error below. And our writ of certiorari commits us to decide only the purely legal question whether or not a claim accrues "where the Respondent continues to commit predicate acts" in the 4-year period immediately preceding suit. Pet. for Cert. i. We have answered that question in Part II–A. And we shall not go beyond the writ's question to reexamine the fact-based rule-application issue that the Klehrs now raise, and which the Eighth Circuit decided in Harvestore's favor.

III

Our writ of certiorari contained one further question, namely, whether

> "affirmative continuing acts of fraud . . . coupled with active cover up of the fraud, act to equitably toll the statute of limitations . . . *whether or not* Petitioners have exercised reasonable diligence to discover their claim." *Ibid.* (emphasis added).

This question refers to the doctrine of "fraudulent concealment," which some courts have said "equitably tolls" the running of a limitations period, see, *e. g., Grimmett,* 75 F. 3d, at 514, while other courts have said it is a form of "equitable estoppel," see, *e. g., Wolin* v. *Smith Barney Inc.,* 83 F. 3d 847, 852 (CA7 1996). Regardless, the question presented here focuses upon a relevant difference among the Circuits in respect to the requirement of "reasonable diligence" on the part of the plaintiff. Some Circuits have held that when a plaintiff does not, in fact, know of a defendant's unlawful activity, and when the defendant takes "affirmative steps" to conceal that unlawful activity, those circumstances are sufficient to toll the limitations period (or to "estop" the defendant from asserting a limitations defense) *irrespective of what the plaintiff should have known.* See, *e. g., id.,* at 852–853. Other courts have held that a plaintiff who has not exercised reasonable diligence may not benefit from the doctrine. See, *e. g., Wood* v. *Carpenter,* 101 U. S. 135, 143 (1879); *Bailey,* 21 Wall., at 349–350; *J. Geils Band Employee Benefit Plan* v. *Smith Barney Shearson, Inc.,* 76 F. 3d 1245, 1252–1255 (CA1 1996) (diligence required for fraudulent concealment under federal law); *Urland* v. *Merrell-Dow Pharmaceuticals, Inc.,* 822 F. 2d 1268, 1273–1274 (CA3 1987) (same with respect to Pennsylvania law); see also 2 Corman § 9.7.1, at 56–57, 60–61, 64–66.

We limit our consideration of the question to the context of civil RICO. In that context, we conclude that "reasonable diligence" does matter, and a plaintiff who is not reasonably diligent may not assert "fraudulent concealment." We reach this conclusion for two reasons. First, in the related antitrust context, where the "fraudulent concealment" doctrine is invoked fairly often, relevant authority uniformly supports the requirement. Professor Areeda says, for example, that "[t]he concealment requirement is satisfied only if the plaintiff shows that he neither knew nor, in the exercise of due diligence, could reasonably have known of the offense." 2 Areeda ¶ 338, at 152; see also I. Scher, Antitrust Adviser § 10.27, p. 10–62 (4th ed. 1995). We have found many antitrust cases that say the same, and none that says the contrary. See, *e. g., Conmar Corp.* v. *Mitsui & Co.*, 858 F. 2d 499, 502 (CA9 1988), cert. denied *sub nom. VSL Corp.* v. *Conmar Corp.*, 488 U. S. 1010 (1989); *Texas* v. *Allan Constr. Co.*, 851 F. 2d 1526, 1533 (CA5 1988); *Pinney Dock & Transport Co.* v. *Penn Central Corp.*, 838 F. 2d 1445, 1465 (CA6), cert. denied *sub nom. Pinney Dock & Transport Co.* v. *Norfolk & Western R. Co.*, 488 U. S. 880 (1988); *New York* v. *Hendrickson Bros., Inc.*, 840 F. 2d 1065, 1083 (CA2), cert. denied, 488 U. S. 848 (1988); *Berkson* v. *Del Monte Corp.*, 743 F. 2d 53, 56 (CA1 1984), cert. denied, 470 U. S. 1056 (1985); *Charlotte Telecasters, Inc.* v. *Jefferson-Pilot Corp.*, 546 F. 2d 570, 574 (CA4 1976).

Second, those courts that do not require "reasonable diligence" have said that the "fraudulent concealment" doctrine seeks to punish defendants for affirmative, discrete acts of concealment; the behavior of plaintiffs is consequently irrelevant. See *Wolin, supra,* at 852; *Robertson* v. *Seidman & Seidman,* 609 F. 2d 583, 593 (CA2 1979); cf. *Urland, supra,* at 1280–1281 (Becker, J., dissenting). Whether or not that is so in the legal contexts at issue in those cases (which were not antitrust cases), it is not so in respect either to antitrust or to civil RICO. Rather, in both of those latter contexts private civil actions seek not only to compensate victims but also to encourage those victims themselves diligently to investigate and thereby to uncover unlawful activity. See *Malley-Duff,* 483 U. S., at 151. That being so, we cannot say that the "fraudulent concealment" is concerned only with the behavior of defendants. For that reason, and in light of the consensus of authority, we conclude that "fraudulent concealment" in the context of civil RICO embodies a "due diligence" requirement.

In their brief on the merits, petitioners have asked us to examine whether the Eighth Circuit properly applied the "due diligence" requirement to the evidentiary materials before it. That fact-based question, however, is beyond the scope of our writ; and for reasons similar to those discussed earlier, see *supra,* at 193, we shall not consider it.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in part and concurring in the judgment.

Twice this Term we have received full briefing and heard oral argument on the question of when a civil Racketeer Influenced and Corrupt Organizations Act (RICO) cause of action accrues; when we rise for our summer recess, the question will remain unanswered. We did not reach it in *Grimmett* v. *Brown,* 519 U. S. 233 (1997), because we dismissed the writ of certiorari as improvidently granted. And we do not reach it today for no particular reason except timidity—declining to say what the *correct* accrual rule is, but merely rejecting the only one of the four candidates[1] under which these petitioners could recover. We thus leave reduced but unresolved the well-known split in authority that prompted us to take this case. There will remain in effect, in some Circuits, one of the three remaining accrual rules—the one that their Courts of Appeals or District Courts have adopted; in the remaining Circuits litigants will have to guess which of the three to follow; and in all of the Circuits no one will know for sure which rule is right—until, at some future date, we receive briefing and argument a third or fourth time, and finally summon up the courage to "unravel," as one commentator has put it, "the mess that characterizes civil RICO accrual decisions," Abrams, Crime Legislation and the Public Interest: Lessons from Civil RICO, 50 SMU L. Rev. 33, 70 (1996).

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[1] The Court's opinion could be read to suggest that there are only three different possible accrual rules—last predicate act, injury discovery, and injury and pattern discovery. See *ante,* at 185–186, 191–193. In fact, as is alluded to in its rejection of the Third Circuit's last predicate act rule, see *ante,* at 188–189, there is a fourth accrual rule—the Clayton Act "injury" rule.

Worse still, the reason the Court gives for regarding the accrual issue as too complex ("subtle and difficult," *ante*, at 192) to be decided on only the second try is a reason that implicates the merits, and that in my view gets the merits wrong. One cannot, the Court says, leap impetuously to the conclusion that the antitrust "injury" accrual rule applies, rather than a "discovery" accrual rule, because civil RICO cases are unlike antitrust cases, in that "a high percentage" of them "involve fraud claims." *Ante*, at 191. This erases, it seems to me, the one clear path back out of the current forest of confusion, which is the proposition that RICO *is similar to the Clayton Act*. This is the proposition that caused us to adopt the Clayton Act statute of limitations in the first place, *specifically rejecting* the argument the Court now finds plausible, that the preponderance of fraud claims under RICO makes the Clayton Act an inappropriate model. We said the similarity was close enough: "Although the large majority of civil RICO complaints use [fraud] as the required predicate offenses, a not insignificant number of complaints allege criminal activity of a type generally associated with professional criminals such as arson, bribery, theft and political corruption." *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U. S. 143, 149 (1987) (rejecting for this reason the use of state-law fraud statutes of limitations). Elsewhere in today's opinion, curiously enough, the Court is quite willing to say that what is good for antitrust is good for RICO—even with respect to a matter much more intimately connected with fraud than the accrual rule, namely, whether invocation of the "fraudulent concealment" rule requires "reasonable diligence" on the plaintiff's part. On this point the Court finds arguments taken from "the related antitrust context" entirely persuasive. *Ante*, at 194. (Apart from that illogical reliance, it seems to me also illogical even to resolve the question whether a statute should be tolled by fraudulent concealment without having resolved the antecedent question of when the statute begins to run.) Similarly, the Court relies heavily on the antitrust injury accrual rule in its analysis rejecting the Third Circuit's last predicate act rule. *Ante*, at 188–191.

I would resolve the Circuit split we granted certiorari to consider, and would hold that, of the four main accrual rules (injury, injury discovery, injury and pattern discovery, and last predicate act), the appropriate accrual rule is the Clayton Act "injury" rule—the "cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U. S. 321, 338 (1971) (referring, of course, to "an act" that violates the governing statute). In *Malley-Duff*, we held that the appropriate statute of limitations for civil RICO actions is the 4-year limitations period found in the Clayton Act. We reasoned that "RICO was patterned after the Clayton Act," 483 U. S., at 150, and that the purpose, structure, and aims of the two schemes were quite similar, *id.*, at 151–152.[2] Although we expressly acknowledged in *Malley-Duff* that we "ha[d] no occasion to decide the appropriate time of accrual for a RICO claim," *id.*, at 157, it takes no profound analysis to figure out what that decision must be. "Presumably the accrual standards developed by the lower federal courts in . . . civil antitrust litigation should be equally applicable to civil enforcement RICO actions." 1 C. Corman, Limitation of Actions § 6.5.5.1, pp. 447–448 (1991).

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[2] "Both RICO and the Clayton Act are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney's fees. Both statutes bring to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate; the mechanism chosen to reach the objective in both the Clayton Act and RICO is the carrot of treble damages. Moreover, both statutes aim to compensate the same type of injury; each requires that a plaintiff show injury 'in his business or property by reason of' a violation." 483 U. S., at 151.

We have said that "[a]ny period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action." *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 463 (1975). It is just as true, I think, that any period of limitation is utterly meaningless without specification of the event that starts it running. As a practical matter, a 4-year statute of limitations means nothing at all unless one knows when the four years start running. If they start, for example, on the 10th anniversary of the injury, the 4-year statute is more akin to a 14-year statute than to the Clayton Act. We would thus have been foolish, in *Malley-Duff,* to speak of "adopting" the Clayton Act statute, and of "patterning" the RICO limitations period after the Clayton Act, if all we meant was using the Clayton Act number of years.

We have recognized this principle in our more established practice (first departed from in *DelCostello* v. *Teamsters,* 462 U. S. 151 (1983)) of borrowing state rather than federal statutes of limitations. We have consistently followed "[s]tate law . . . in a variety of cases that raised questions concerning the overtones and details of application of the state limitation period to the federal cause of action. *Auto Workers* v. *Hoosier Corp.*, 383 U. S. [696,] 706 [(1966)] (characterization of the cause of action); *Cope* v. *Anderson,* 331 U. S. [461,] 465–467 [(1947)] (place where cause of action arose); *Barney* v. *Oelrichs,* 138 U. S. 529 (1891) (absence from State as a tolling circumstance)." *Johnson, supra,* at 464. See also, *e. g., Chardon* v. *Fumero Soto,* 462 U. S. 650, 657, 662 (1983). "In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application. Courts thus should not unravel state limitations rules unless their full application would defeat the goals of the federal statute at issue." *Hardin* v. *Straub,* 490 U. S. 536, 539 (1989) (internal quotation marks and citation omitted). There is no conceivable reason why the same principle should not apply to the borrowing of an analogous federal, rather than state, limitations period.

Both the allurement and the vice of the "mix-and-match" approach to statutes-of-limitations borrowing (the possibility of which the Court today entertains) is that it provides broad scope for judicial lawmaking. We should have resisted that allurement today,[3] as we resisted it in the past: "[W]e find no support in our cases for the practice of borrowing only a portion of an express statute of limitations. Indeed, *such a practice comes close to the type of judicial policymaking that our borrowing doctrine was intended to avoid.*" *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson,* 501 U. S. 350, 362, n. 8 (1991) (emphasis added). It is, in other words, no wonder that the Court finds the question it has posed for itself today "subtle and difficult"; judicial policywonking is endlessly demanding, and constructing a statute of limitations is much more complicated than adopting one. Finding the most analogous cause of action whose limitations provision can be adopted is relatively simple (for the cause of action before us, we did it in *Malley-Duff*); but limiting the adoption to merely the term of years set forth in the limitations provision, and then selecting, to go with that term of years, the precise accrual rule, tolling rule, estoppel rule, etc., that will clothe the limitations-naked statute with an ensemble of policy perfection—well that is, I concede, a task that should not be attacked all at once, but rather undertaken piecemeal, over several decades, as the Court has chosen to do today. I prefer to stand by the ruder, humbler, but more efficient and predictable practice we have followed in the past: When we adopt a statute of limitations from an analogous federal cause of action we adopt it in whole, with all its accoutrements. Perhaps (though I am dubious) there is room for an exception similar to the one made in our state-borrowing practice, see *Hardin*, *supra*, that would permit rejection of an element that "would defeat the goals of the federal statute at issue," 490 U. S., at 539. But unless this exception is to gobble up the rule, nothing so extreme is represented by the Clayton Act accrual rule.

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[3] The Court disclaims any intent to adopt a "mix-and-match" approach, *ante,* at 193, but that seems to me inconsistent with its repeated references to the possibility of a discovery accrual rule—which is (and has been thought to be) the antithesis of the Clayton Act injury accrual rule. If the Court merely means to say that it is not sure how the Clayton Act accrual rule would apply in this case, then it should simply say so—thereby going a long way toward resolving the Circuit split and rendering this concurrence unnecessary.

Applying the Clayton Act accrual rule, I agree with the Court that petitioners' cause of action accrued more than four years before the filing of this action on August 27, 1993. See *ante*, at 192. Since the Court of Appeals determined, under a more relaxed accrual rule, that petitioners should have *discovered* all of the RICO elements (which would include their injury) prior to 1989, it follows, *a fortiori*, that under the Clayton Act injury accrual rule, petitioners' cause of action is untimely.

I also agree with the Court that petitioners are not entitled to invoke the fraudulent concealment doctrine. As the Court persuasively demonstrates, in the antitrust context " '[t]he concealment requirement is satisfied only if the plaintiff shows that he neither knew nor, in the exercise of due diligence, could reasonably have known of the offense.' "

Ante, at 195 (quoting 2 P. Areeda & H. Hovenkamp, Antitrust Law ¶ 338b, p. 152 (rev. ed. 1995)). I therefore join Part III of the Court's opinion.

For the foregoing reasons, I concur in the judgment of the Court.

AGOSTINI ET AL. *v.* FELTON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 96–552. Argued April 15, 1997—Decided June 23, 1997*

In *Aguilar* v. *Felton,* 473 U. S. 402, 413, this Court held that New York City's program that sent public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to Title I of the Elementary and Secondary Education Act of 1965 necessitated an excessive entanglement of church and state and violated the First Amendment's Establishment Clause. On remand, the District Court entered a permanent injunction reflecting that ruling. Some 10 years later, petitioners—the parties bound by the injunction—filed motions in the same court seeking relief from the injunction's operation under Federal Rule of Civil Procedure 60(b)(5). They emphasized the significant costs of complying with *Aguilar* and the assertions of five Justices in *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet,* 512 U. S. 687, that *Aguilar* should be reconsidered, and argued that relief was proper under Rule 60(b)(5) and *Rufo* v. *Inmates of Suffolk County Jail,* 502 U. S. 367, 388, because *Aguilar* cannot be squared with this Court's intervening Establishment Clause jurisprudence and is no longer good law. The District Court denied the motion on the merits, declaring that *Aguilar*'s demise has "not yet occurred." The Second Circuit agreed and affirmed.

Held:

1. A federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees under a program containing safeguards such as those present in New York City's Title I program. Accordingly, *Aguilar,* as well as that portion of its companion case, *School Dist. of Grand Rapids* v. *Ball,* 473 U. S. 373, addressing a "Shared Time" program, are no longer good law. Pp. 215–236.

(a) Under *Rufo, supra,* at 384, Rule 60(b)(5)—which states that, "upon such terms as are just, the court may relieve a party . . . from a final judgment . . . [when] it is no longer equitable that the judgment

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*Together with No. 96–553, *Chancellor, Board of Education of the City of New York, et al.* v. *Felton et al.,* also on certiorari to the same court.

should have prospective application"—authorizes relief from an injunction if the moving party shows a significant change either in factual conditions or in law. Since the exorbitant costs of complying with the injunction were known at the time *Aguilar* was decided, see, *e. g.*, 473 U. S., at 430–431 (O'CONNOR, J., dissenting), they do not constitute a change in factual conditions sufficient to warrant relief, accord, *Rufo*, *supra*, at 385. Also unavailing is the fact that five Justices in *Kiryas Joel* expressed the view that *Aguilar* should be reconsidered or overruled. Because the question of *Aguilar*'s propriety was not before the Court in that case, those Justices' views cannot be said to have effected a change in Establishment Clause law. Thus, petitioners' ability to satisfy Rule 60(b)(5)'s prerequisites hinges on whether the Court's later Establishment Clause cases have so undermined *Aguilar* that it is no longer good law. Pp. 215–218.

(b) To answer that question, it is necessary to understand the rationale upon which *Aguilar* and *Ball* rested. One of the programs evaluated in *Ball* was the Grand Rapids, Michigan, Shared Time program, which is analogous to New York City's Title I program. Applying the three-part *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613, test, the *Ball* Court acknowledged that the Shared Time program satisfied the test's first element in that it served a purely secular purpose, 473 U. S., at 383, but ultimately concluded that it had the impermissible effect of advancing religion, in violation of the test's second element, *id.*, at 385. That conclusion rested on three assumptions: (i) any public employee who works on a religious school's premises is presumed to inculcate religion in her work, see *id.*, at 385–389; (ii) the presence of public employees on private school premises creates an impermissible symbolic union between church and state, see *id.*, at 389, 391; and (iii) any public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking, see *id.*, at 385, 393, 395–397. Additionally, *Aguilar* set forth a fourth assumption: that New York City's Title I program necessitates an excessive government entanglement with religion, in violation of the *Lemon* test's third element, because public employees who teach on religious school premises must be closely monitored to ensure that they do not inculcate religion. See 473 U. S., at 409, 412–414. Pp. 218–222.

(c) The Court's more recent cases have undermined the assumptions upon which *Ball* and *Aguilar* relied. Contrary to *Aguilar*'s conclusion, placing full-time government employees on parochial school campuses does not as a matter of law have the impermissible effect of advancing religion through indoctrination. Subsequent cases have modified in two significant respects the approach the Court uses to assess whether the government has impermissibly advanced religion by inculcating religious beliefs. First, the Court has abandoned *Ball's* presumption that public employees placed on parochial school grounds will inevitably inculcate religion or that their presence constitutes a symbolic union between government and religion. *Zobrest* v. *Catalina Foothills School Dist.*, 509 U. S. 1, 12–13. No evidence has ever shown that any New York City instructor teaching on parochial school premises attempted to inculcate religion in students. Second, the Court has departed from *Ball's* rule that all government aid that directly aids the educational function of religious schools is invalid. *Witters* v. *Washington Dept. of Servs. for Blind*, 474 U. S. 481, 487; *Zobrest, supra*, at 10, 12. In all relevant respects, the provision of the instructional services here at issue is indistinguishable from the provision of a sign-language interpreter in *Zobrest*. *Zobrest* and *Witters* make clear that, under current law, the Shared Time program in *Ball* and New York City's Title I program will not, as a matter of law, be deemed to have the effect of advancing religion through indoctrination. Thus, both this Court's precedent and its experience require rejection of the premises upon which *Ball* relied. Pp. 222–230.

(d) New York City's Title I program does not give aid recipients any incentive to modify their religious beliefs or practices in order to obtain program services. Although *Ball* and *Aguilar* completely ignored this consideration, other Establishment Clause cases before and since have examined the criteria by which an aid program identifies its beneficiaries to determine whether the criteria themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination. Cf., *e. g., Witters, supra*, at 488; *Zobrest, supra*, at 10. Such an incentive is not present where, as here, the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis. Under such circumstances, the aid is less likely to have the effect of advancing religion. See *Widmar* v. *Vincent*, 454 U. S. 263, 274. New York City's Title I services are available to all children who meet the eligibility requirements, no matter what their religious beliefs or where they go to school. Pp. 230–232.

(e) The *Aguilar* Court erred in concluding that New York City's Title I program resulted in an excessive entanglement between church and state. Regardless of whether entanglement is considered in the course of assessing if a program has an impermissible effect of advancing religion, *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664, 674, or as a factor separate and apart from "effect," *Lemon* v. *Kurtzman*, 403 U. S., at 612–613, the considerations used to assess its excessiveness are similar: The Court looks to the character and purposes of the benefited institutions, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority. *Id.*, at 615. It is simplest to recognize why entanglement is significant and treat it—as the Court did in *Walz*—as an aspect of the inquiry into a statute's effect. The *Aguilar* Court's finding of "excessive" entanglement rested on three grounds: (i) the program would require "pervasive monitoring by public authorities" to ensure that Title I employees did not inculcate religion; (ii) the program required "administrative cooperation" between the government and parochial schools; and (iii) the program might increase the dangers of "political divisiveness." 473 U. S., at 413–414. Under the Court's current Establishment Clause understanding, the last two considerations are insufficient to create an "excessive entanglement" because they are present no matter where Title I services are offered, but no court has held that Title I services cannot be offered off campus. *E. g., Aguilar, supra.* Further, the first consideration has been undermined by *Zobrest.* Because the Court in *Zobrest* abandoned the presumption that public employees will inculcate religion simply because they happen to be in a sectarian environment, there is no longer any need to assume that *pervasive* monitoring of Title I teachers is required. There is no suggestion in the record that the system New York City has in place to monitor Title I employees is insufficient to prevent or to detect inculcation. Moreover, the Court has failed to find excessive entanglement in cases involving far more onerous burdens on religious institutions. See *Bowen* v. *Kendrick,* 487 U. S. 589, 615–617. Pp. 232–235.

(f) Thus, New York City's Title I program does not run afoul of any of three primary criteria the Court currently uses to evaluate whether government aid has the effect of advancing religion: It does not result in governmental indoctrination, define its recipients by reference to religion, or create an excessive entanglement. Nor can this carefully constrained program reasonably be viewed as an endorsement of religion. Pp. 234–235.

(g) The *stare decisis* doctrine does not preclude this Court from recognizing the change in its law and overruling *Aguilar* and those portions of *Ball* that are inconsistent with its more recent decisions. *E. g., United States* v. *Gaudin,* 515 U. S. 506, 521. Moreover, in light of the Court's conclusion that *Aguilar* would be decided differently under current Establishment Clause law, adherence to that decision would undoubtedly work a "manifest injustice," such that the law of the case doctrine does not apply. Accord, *Davis* v. *United States,* 417 U. S. 333, 342. Pp. 235–236.

2. The significant change in this Court's post-*Aguilar* Establishment Clause law entitles petitioners to relief under Rule 60(b)(5). The Court's general practice is to apply the rule of law it is announcing to the parties before it, *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 485, even when it is overruling a case, *e. g.*, *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 237–238. The Court neither acknowledges nor holds that other courts should ever conclude that its more recent cases have, by implication, overruled an earlier precedent. Rather, lower courts should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions. *Rodriguez de Quijas, supra,* at 484. Respondents' various arguments as to why relief should not be granted in this litigation—that a different analysis is required because the Court is here reviewing for abuse of discretion the District Court's denial of relief; that petitioners' unprecedented use of Rule 60(b)(5) as a vehicle for *effecting* changes in the law, rather than as a means of *recognizing* them, will encourage litigants to burden the federal courts with a deluge of Rule 60(b)(5) motions; that petitioners' use of Rule 60(b) in this context will erode the Court's institutional integrity; and that the Court should wait for a "better vehicle" in which to evaluate *Aguilar*'s continuing vitality—are not persuasive. Pp. 237–240.

101 F. 3d 1394, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. SOUTER, J., filed a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined, and in which BREYER, J., joined as to Part II, *post*, p. 240. GINSBURG, J., filed a dissenting opinion, in which STEVENS, SOUTER, and BREYER, JJ., joined, *post*, p. 255.

Acting Solicitor General Dellinger argued the cause for the Secretary of Education, respondent under this Court's Rule 12.6, in support of petitioners. With him on the briefs were *Assistant Attorney General Hunger*, *Deputy Solicitor General Waxman*, *Deputy Assistant Attorney General Preston*, *Paul R. Q. Wolfson*, *Michael Jay Singer*, and *Howard S. Scher*.

Paul A. Crotty argued the cause for petitioners in both cases. With him on the briefs for petitioners in No. 96–553 were *Leonard Koerner* and *Stephen J. McGrath*. *Kevin T.*

Baine and *Emmet T. Flood* filed a brief for petitioners in No. 96–552.

Stanley Geller argued the cause and filed a brief for respondents Felton et al.†

JUSTICE O'CONNOR delivered the opinion of the Court.

In *Aguilar* v. *Felton,* 473 U. S. 402 (1985), this Court held that the Establishment Clause of the First Amendment barred the city of New York from sending public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to a congressionally mandated program. On remand, the District Court for the Eastern District of New York entered a permanent injunction reflecting our ruling. Twelve years later, petitioners—the parties bound by that injunction—seek relief from its operation. Petitioners maintain that *Aguilar* cannot be squared with our intervening Establishment Clause jurisprudence and ask that we explicitly recognize what our more recent cases already dictate: *Aguilar* is no longer good law. We agree with petitioners that *Aguilar* is not consistent with our subsequent Establishment Clause decisions and further conclude that, on the facts presented here, petitioners are entitled under Federal Rule of Civil Procedure 60(b)(5) to relief from the operation of the District Court's prospective injunction.

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†Briefs of *amici curiae* urging reversal were filed for the Becket Fund for Religious Liberty by *Kevin J. Hasson;* for the Christian Legal Society et al. by *Michael W. McConnell, Thomas C. Berg, Steven T. McFarland, Kimberlee Wood Colby,* and *Samuel B. Casey;* for the Knights of Columbus by *James W. Shannon, Jr.;* for the National Jewish Commission on Law and Public Affairs by *Nathan Lewin* and *Dennis Rapps;* for Senator Robert F. Bennett by *Ronald D. Maines;* and for Sarah Peter et al. by *Michael Joseph Woodruff* and *Scott J. Ward.*

Briefs of *amici curiae* urging affirmance were filed for the American Jewish Congress et al. by *Norman Redlich, Marc D. Stern, Marvin E. Frankel, David J. Strom, Richard T. Foltin, J. Brent Walker, Melissa Rogers, Robert Chanin, John West, Elliot M. Mincberg,* and *Judith E. Schaeffer;* and for Americans United for Separation of Church and State et al. by *Steven K. Green, Julie A. Segal, Steven R. Shapiro,* and *Arthur N. Eisenberg.*

Briefs of *amici curiae* were filed for the Council on Religious Freedom et al. by *Lee Boothby, Walter E. Carson,* and *Robert W. Nixon;* for the Institute for Justice et al. by *Mark Snyderman, William H. Mellor III,* and *Clint Bolick;* for the New York County Lawyers Association Committee on Supreme Court of the United States by *H. Elliot Wales;* for the Pacific Legal Foundation by *Sharon L. Browne;* and for the United States Catholic Conference by *Mark E. Chopko, John A. Liekweg,* and *Jeffrey Hunter Moon.*

I

In 1965, Congress enacted Title I of the Elementary and Secondary Education Act of 1965, 79 Stat. 27, as modified, 20 U. S. C. §6301 *et seq.*, to "provid[e] full educational opportunity to every child regardless of economic background." S. Rep. No. 146, 89th Cong., 1st Sess., 5 (1965) (hereinafter Title I). Toward that end, Title I channels federal funds, through the States, to "local educational agencies" (LEA's). 20 U. S. C. §§6311, 6312.* The LEA's spend these funds to provide remedial education, guidance, and job counseling to eligible students. §§6315(c)(1)(A) (LEA's must use funds to "help participating children meet . . . State student performance standards"), 6315(c)(1)(E) (LEA's may use funds to provide "counseling, mentoring, and other pupil services"); see also §§6314(b)(1)(B)(i), (iv). An eligible student is one (i) who resides within the attendance boundaries of a public school located in a low-income area, §6313(a)(2)(B); and (ii) who is failing, or is at risk of failing, the State's student performance standards, §6315(b)(1)(B). Title I funds must be made available to *all* eligible children, regardless of whether they attend public schools, §6312(c)(1)(F), and the services provided to children attending private schools must be "equitable in comparison to services and other benefits for public school children," § 6321(a)(3); see § 6321(a)(1); 34 CFR §§ 200.10(a), 200.11(b) (1996).

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*Title I has been reenacted, in varying forms, over the years, most recently in the Improving America's Schools Act of 1994, 108 Stat. 3518. We will refer to the current Title I provisions, which do not differ meaningfully for our purposes from the Title I program referred to in our previous decision in this litigation.

An LEA providing services to children enrolled in private schools is subject to a number of constraints that are not imposed when it provides aid to public schools. Title I services may be provided only to those private school students eligible for aid, and cannot be used to provide services on a "school-wide" basis. Compare 34 CFR § 200.12(b) (1996) with 20 U. S. C. § 6314 (allowing "school-wide" programs at public schools). In addition, the LEA must retain complete control over Title I funds; retain title to all materials used to provide Title I services; and provide those services through public employees or other persons independent of the private school and any religious institution. §§ 6321(c)(1), (2). The Title I services themselves must be "secular, neutral, and nonideological," § 6321(a)(2), and must "supplement, and in no case supplant, the level of services" already provided by the private school, 34 CFR § 200.12(a) (1996).

Petitioner Board of Education of the City of New York (hereinafter Board), an LEA, first applied for Title I funds in 1966 and has grappled ever since with how to provide Title I services to the private school students within its jurisdiction. Approximately 10% of the total number of students eligible for Title I services are private school students. See App. 38, 620. Recognizing that more than 90% of the private schools within the Board's jurisdiction are sectarian, *Felton* v. *Secretary, United States Dept. of Ed.*, 739 F. 2d 48, 51 (CA2 1984), the Board initially arranged to transport children to public schools for after-school Title I instruction. But this enterprise was largely unsuccessful. Attendance was poor, teachers and children were tired, and parents were concerned for the safety of their children. *Ibid.* The Board then moved the after-school instruction onto private school campuses, as Congress had contemplated when it enacted Title I. See *Wheeler* v. *Barrera*, 417 U. S. 402, 422 (1974). After this program also yielded mixed results, the Board implemented the plan we evaluated in *Aguilar* v. *Felton*, 473 U. S. 402 (1985).

That plan called for the provision of Title I services on private school premises during school hours. Under the plan, only public employees could serve as Title I instructors and counselors. *Id.*, at 406. Assignments to private schools were made on a voluntary basis and without regard to the religious affiliation of the employee or the wishes of the private school. *Ibid.;* 739 F. 2d, at 53. As the Court of Appeals in *Aguilar* observed, a large majority of Title I teachers worked in nonpublic schools with religious affiliations different from their own. 473 U. S., at 406. The vast majority of Title I teachers also moved among the private schools, spending fewer than five days a week at the same school. *Ibid.*

Before any public employee could provide Title I instruction at a private school, she would be given a detailed set of written and oral instructions emphasizing the secular purpose of Title I and setting out the rules to be followed to ensure that this purpose was not compromised. Specifically, employees would be told that (i) they were employees of the Board and accountable only to their public school supervisors; (ii) they had exclusive responsibility for selecting students for the Title I program and could teach only those children who met the eligibility criteria for Title I; (iii) their materials and equipment would be used only in the Title I program; (iv) they could not engage in team teaching or other cooperative instructional activities with private school teachers; and (v) they could not introduce any religious matter into their teaching or become involved in any way with the religious activities of the private schools. *Ibid.* All religious symbols were to be removed from classrooms used for Title I services. *Id.*, at 407. The rules acknowledged that it might be necessary for Title I teachers to consult with a student's regular classroom teacher to assess the student's particular needs and progress, but admonished instructors to limit those consultations to mutual professional concerns regarding the student's education. 739 F. 2d, at 53. To ensure compliance with these rules, a publicly employed field supervisor was to attempt to make at least one unannounced visit to each teacher's classroom every month. 473 U. S., at 407.

In 1978, six federal taxpayers—respondents here—sued the Board in the District Court for the Eastern District of New York. Respondents sought declaratory and injunctive relief, claiming that the Board's Title I program violated the Establishment Clause. The District Court permitted the parents of a number of parochial school students who were receiving Title I services to intervene as codefendants. The District Court granted summary judgment for the Board, but the Court of Appeals for the Second Circuit reversed. While noting that the Board's Title I program had "done so much good and little, if any, detectable harm," 739 F. 2d, at 72, the Court of Appeals nevertheless held that *Meek* v. *Pittenger*, 421 U. S. 349 (1975), and *Wolman* v. *Walter*, 433 U. S. 229 (1977), compelled it to declare the program unconstitutional. In a 5-to-4 decision, this Court affirmed on the ground that the Board's Title I program necessitated an "excessive entanglement of church and state in the administration of [Title I] benefits." 473 U. S., at 414. On remand, the District Court permanently enjoined the Board

> "from using public funds for any plan or program under [Title I] to the extent that it requires, authorizes or permits public school teachers and guidance counselors to provide teaching and counseling services on the premises of sectarian schools within New York City." App. to Pet. for Cert. in No. 96–553, pp. A25–A26.

The Board, like other LEA's across the United States, modified its Title I program so it could continue serving those students who attended private religious schools. Rather than offer Title I instruction to parochial school students at their schools, the Board reverted to its prior practice of providing instruction at public school sites, at leased sites, and in mobile instructional units (essentially vans converted into classrooms) parked near the sectarian school. The Board also offered computer-aided instruction, which could be provided "on premises" because it did not require public employees to be physically present on the premises of a religious school. App. 315.

It is not disputed that the additional costs of complying with *Aguilar*'s mandate are significant. Since the 1986–1987 school year, the Board has spent over $100 million providing computer-aided instruction, leasing sites and mobile instructional units, and transporting students to those sites. App. 333 ($93.2 million spent between 1986–1987 and 1993–1994 school years); *id.*, at 336 (annual additional costs average around $15 million). Under the Secretary of Education's regulations, those costs "incurred as a result of implementing alternative delivery systems to comply with the requirements of *Aguilar* v. *Felton*" and not paid for with other state or federal funds are to be deducted from the federal grant before the Title I funds are distributed to *any* student. 34 CFR § 200.27(c) (1996). These "*Aguilar* costs" thus reduce the amount of Title I money an LEA has available for remedial education, and LEA's have had to cut back on the number of students who receive Title I benefits. From Title I funds available for New York City children between the 1986–1987 and the 1993–1994 school years, the Board had to deduct $7.9 million "off-the-top" for compliance with *Aguilar*. App. 333. When *Aguilar* was handed down, it was estimated that some 20,000 economically disadvantaged children in the city of New York, see 473 U. S., at 431

(O'CONNOR, J., dissenting), and some 183,000 children nationwide, see L. Levy, The Establishment Clause 176 (1986), would experience a decline in Title I services. See also S. Rep. No. 100–222, p. 14 (1987) (estimating that *Aguilar* costs have "resulted in a decline of about 35 percent in the number of private school children who are served").

In October and December of 1995, petitioners—the Board and a new group of parents of parochial school students entitled to Title I services—filed motions in the District Court seeking relief under Federal Rule of Civil Procedure 60(b) from the permanent injunction entered by the District Court on remand from our decision in *Aguilar.* Petitioners argued that relief was proper under Rule 60(b)(5) and our decision in *Rufo* v. *Inmates of Suffolk County Jail,* 502 U. S. 367, 388 (1992), because the "decisional law [had] changed to make legal what the [injunction] was designed to prevent." Specifically, petitioners pointed to the statements of five Justices in *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet,* 512 U. S. 687 (1994), calling for the overruling of *Aguilar.* The District Court denied the motion. The District Court recognized that petitioners, "at bottom," sought "a procedurally sound vehicle to get the [propriety of the injunction] back before the Supreme Court," App. to Pet. for Cert. in No. 96–553, p. A12, and concluded that "the Board ha[d] properly proceeded under Rule 60(b) to seek relief from the injunction." *Id.,* at A19. Despite its observations that "the landscape of Establishment Clause decisions has changed," *id.,* at A10, and that "[t]here may be good reason to conclude that *Aguilar*'s demise is imminent," *id.,* at A20, the District Court denied the Rule 60(b) motion on the merits because *Aguilar*'s demise had "not yet occurred." The Court of Appeals for the Second Circuit "affirmed substantially for the reasons stated in" the District Court's opinion. App. to Pet. for Cert. in No. 96–553, p. A5; judgt. order reported at 101 F. 3d 1394 (1996). We granted certiorari, 519 U. S. 1086 (1997), and now reverse.

II

The question we must answer is a simple one: Are petitioners entitled to relief from the District Court's permanent injunction under Rule 60(b)? Rule 60(b)(5), the subsection under which petitioners proceeded below, states:

> "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment [or] order . . . [when] it is no longer equitable that the judgment should have prospective application."

In *Rufo* v. *Inmates of Suffolk County Jail*, *supra*, at 384, we held that it is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from an injunction or consent decree can show "a significant change either in factual conditions or in law." A court may recognize subsequent changes in either statutory or decisional law. See *Railway Employees* v. *Wright*, 364 U. S. 642, 652–653 (1961) (consent decree should be vacated under Rule 60(b) in light of amendments to the Railway Labor Act); *Rufo*, *supra*, at 393 (vacating denial of Rule 60(b)(5) motion and remanding so District Court could consider whether consent decree should be modified in light of *Bell* v. *Wolfish*, 441 U. S. 520 (1979)); *Pasadena City Bd. of Ed.* v. *Spangler*, 427 U. S. 424, 437–438 (1976) (injunction should have been vacated in light of *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1 (1971)). A court errs when it refuses to modify an injunction or consent decree in light of such changes. See *Wright*, *supra*, at 647 ("[T]he court cannot be required to disregard significant changes in law or facts if it is satisfied that what it has been doing has been turned through changed circumstances into an instrument of wrong" (internal quotation marks omitted)).

Petitioners point to three changes in the factual and legal landscape that they believe justify their claim for relief under Rule 60(b)(5). They first contend that the exorbitant costs of complying with the District Court's injunction constitute a significant factual development warranting modification of the injunction. See Brief for Petitioner Agostini et al. 38–40. Petitioners also argue that there have been two significant legal developments since *Aguilar* was decided: a majority of Justices have expressed their views that *Aguilar* should be reconsidered or overruled, see *supra,* at 214; and *Aguilar* has in any event been undermined by subsequent Establishment Clause decisions, including *Witters* v. *Washington Dept. of Servs. for Blind,* 474 U. S. 481 (1986), *Zobrest* v. *Catalina Foothills School Dist.,* 509 U. S. 1 (1993), and *Rosenberger* v. *Rector and Visitors of Univ. of Va.,* 515 U. S. 819 (1995).

Respondents counter that, because the costs of providing Title I services off site were known at the time *Aguilar* was decided, and because the relevant case law has not changed, the District Court did not err in denying petitioners' motions. Obviously, if neither the law supporting our original decision in this litigation nor the facts have changed, there would be no need to decide the propriety of a Rule 60(b)(5) motion. Accordingly, we turn to the threshold issue whether the factual or legal landscape has changed since we decided *Aguilar.*

We agree with respondents that petitioners have failed to establish the significant change in factual conditions required by *Rufo.* Both petitioners and this Court were, at the time *Aguilar* was decided, aware that additional costs would be incurred if Title I services could not be provided in parochial school classrooms. See App. 66–68 (Defendants' Joint Statement of Material Facts Not In Dispute, filed in 1982, detailing costs of providing off-premises services); *Aguilar,* 473 U. S., at 430–431 (O'CONNOR, J., dissenting) (observing that costs of complying with *Aguilar* decision would likely cause a decline in Title I services for 20,000 New York City students). That these predictions of additional costs turned out to be accurate does not constitute a change in factual conditions warranting relief under Rule 60(b)(5). Accord, *Rufo,* *supra,* at 385 ("Ordinarily . . . modification should not be granted where a party relies upon events that actually were anticipated at the time [the order was entered]").

We also agree with respondents that the statements made by five Justices in *Kiryas Joel* do not, in themselves, furnish a basis for concluding that our Establishment Clause jurisprudence has changed. In *Kiryas Joel,* we considered the constitutionality of a New York law that carved out a public school district to coincide with the boundaries of the village of Kiryas Joel, which was an enclave of the Satmar Hasidic sect. Before the new district was created, Satmar children wishing to receive special educational services under the Individuals with Disabilities Education Act (IDEA), 20 U. S. C. § 1400 *et seq.,* could receive those services at public schools located outside the village. Because Satmar parents rarely permitted their children to attend those schools, New York created a new public school district within the boundaries of the village so that Satmar children could stay within the village but receive IDEA services on public school premises from publicly employed instructors. In the course of our opinion, we observed that New York had created the special school district in response to our decision in *Aguilar,* which had required New York to cease providing IDEA services to Satmar children on the premises of their private religious schools. 512 U. S., at 692. Five Justices joined opinions calling for reconsideration of *Aguilar.* See 512 U. S., at 718 (O'CONNOR, J., concurring in part and concurring in judgment); *id.,* at 731 (KENNEDY, J., concurring in judgment); *id.,* at 750 (SCALIA, J., joined by REHNQUIST, C. J., and THOMAS, J., dissenting). But the question of *Aguilar*'s propriety was not before us. The views of five Justices that the case should be reconsidered or overruled cannot be said to have effected a change in Establishment Clause law.

In light of these conclusions, petitioners' ability to satisfy the prerequisites of Rule 60(b)(5) hinges on whether our later Establishment Clause cases have so undermined

Aguilar that it is no longer good law. We now turn to that inquiry.

III

A

In order to evaluate whether *Aguilar* has been eroded by our subsequent Establishment Clause cases, it is necessary to understand the rationale upon which *Aguilar*, as well as its companion case, *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373 (1985), rested.

In *Ball*, the Court evaluated two programs implemented by the School District of Grand Rapids, Michigan. The district's Shared Time program, the one most analogous to Title I, provided remedial and "enrichment" classes, at public expense, to students attending nonpublic schools. The classes were taught during regular school hours by publicly employed teachers, using materials purchased with public funds, on the premises of nonpublic schools. The Shared Time courses were in subjects designed to supplement the "core curriculum" of the nonpublic schools. *Id.*, at 375–376. Of the 41 nonpublic schools eligible for the program, 40 were " 'pervasively sectarian' " in character—that is, " 'the purpos[e] of [those] schools [was] to advance their particular religions.' " *Id.*, at 379.

The Court conducted its analysis by applying the three-part test set forth in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971):

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." 473 U. S., at 382–383 (quoting *Lemon, supra*, at 612–613) (citations and internal quotation marks omitted).

The Court acknowledged that the Shared Time program served a purely secular purpose, thereby satisfying the first part of the so-called *Lemon* test. 473 U. S., at 383. Nevertheless, it ultimately concluded that the program had the impermissible effect of advancing religion. *Id.*, at 385.

The Court found that the program violated the Establishment Clause's prohibition against "government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith" in at least three ways. *Ibid.* First, drawing upon the analysis in *Meek* v. *Pittenger*, 421 U. S. 349 (1975), the Court observed that "the teachers participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs." 473 U. S., at 385. *Meek* invalidated a Pennsylvania program in which full-time public employees provided supplemental "auxiliary services"—remedial and accelerated instruction, guidance counseling and testing, and speech and hearing services—to nonpublic school children at their schools. 473 U. S., at 367–373. Although the auxiliary services themselves were secular, they were mostly dispensed on the premises of parochial schools, where "an atmosphere dedicated to the advancement of religious belief [was] constantly maintained." *Meek*, 421 U. S., at 371. Instruction in that atmosphere was sufficient to create "[t]he potential for impermissible fostering of religion." *Id.*, at 372. Cf. *Wolman* v. *Walter*, 433 U. S., at 248 (upholding programs employing public employees to provide remedial instruction and guidance counseling to nonpublic school children at sites away from the nonpublic school).

The Court concluded that Grand Rapids' program shared these defects. 473 U. S., at 386. As in *Meek*, classes were conducted on the premises of religious schools. Accordingly, a majority found a "'substantial risk'" that teachers—even those who were not employed by the private schools—might "subtly (or overtly) conform their instruction to the [pervasively sectarian] environment in which they [taught]." 473 U. S., at 388. The danger of "state-sponsored indoctrination" was only exacerbated by the school district's failure to monitor the courses for religious content. *Id.*, at 387. Notably, the Court disregarded the lack of evidence of any specific incidents of religious indoctrination as largely irrelevant, reasoning that potential witnesses to any indoctrination—the parochial school students, their parents, or parochial school officials—might be unable to detect or have little incentive to report the incidents. *Id.*, at 388–389.

The presence of public teachers on parochial school grounds had a second, related impermissible effect: It created a "graphic symbol of the 'concert or union or dependency' of church and state," *id.*, at 391 (quoting *Zorach* v. *Clauson*, 343 U. S. 306, 312 (1952)), especially when perceived by "children in their formative years," 473 U. S., at 390. The Court feared that this perception of a symbolic union between church and state would "conve[y] a message of government endorsement . . . of religion" and thereby violate a "core purpose" of the Establishment Clause. *Id.*, at 389.

Third, the Court found that the Shared Time program impermissibly financed religious indoctrination by subsidizing "the primary religious mission of the institutions affected." *Id.*, at 385. The Court separated its prior decisions evaluating programs that aided the secular activities of religious institutions into two categories: those in which it concluded that the aid resulted in an effect that was "indirect, remote, or incidental" (and upheld the aid); and those in which it concluded that the aid resulted in "a direct and substantial advancement of the sectarian enterprise" (and invalidated the aid). *Id.*, at 393 (internal quotation marks omitted). In light of *Meek* and *Wolman*, Grand Rapids' program fell into the latter category. In those cases, the Court ruled that a state loan of instructional equipment and materials to parochial schools was an impermissible form of "direct aid" because it "advanced the primary, religion-oriented educational function of the sectarian school," 473 U. S., at 395 (citations and internal quotation marks omitted), by providing "in-kind" aid (*e. g.*, instructional materials) that could be used to teach religion and by freeing up money for religious indoctrination that the school would otherwise have devoted to secular education. Given the holdings in *Meek* and *Wolman*, the Shared Time program—which provided teachers as well as instructional equipment and materials—was surely invalid. 473 U. S., at 395. The *Ball* Court likewise placed no weight on the fact that the program was provided to the student rather than to the school. Nor was the impermissible effect mitigated by the fact that the program only supplemented the courses offered by the parochial schools. *Id.*, at 395–397.

The New York City Title I program challenged in *Aguilar* closely resembled the Shared Time program struck down in *Ball*, but the Court found fault with an aspect of the Title I program not present in *Ball:* The Board had "adopted a system for monitoring the religious content of publicly funded Title I classes in the religious schools." 473 U. S., at 409. Even though this monitoring system might prevent the Title I program from being used to inculcate religion, the Court concluded, as it had in *Lemon* and *Meek*, that the level of monitoring necessary to be "certain" that the program had an exclusively secular effect would "inevitably resul[t] in the excessive entanglement of church and state," thereby running afoul of *Lemon*'s third prong. 473 U. S., at 409; see *Lemon*, 403 U. S., at 619 (invalidating Rhode Island program on entanglement grounds because "[a] comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that th[e] restrictions [against indoctrination] are obeyed"); *Meek, supra,* at 370 (invalidating Pennsylvania program on entanglement grounds because excessive monitoring would be required for the State to be certain that public school officials do not inculcate religion). In the majority's view, New York City's Title I program suffered from the "same critical elements of entanglement" present in *Lemon* and *Meek:* the aid was provided "in a pervasively sectarian environment . . . in the form of teachers," requiring "ongoing inspection . . . to ensure the absence of a religious message." 473 U. S., at 412. Such "pervasive monitoring by public authorities in the sectarian schools infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement." *Id.*, at 413. The Court noted two further forms of entanglement inherent in New York City's Title I program: the "administrative cooperation" required to implement Title I services and the "dangers of political divisiveness" that might grow out of the day-to-day decisions public officials would have to make in order to provide Title I services. *Id.*, at 413–414.

Distilled to essentials, the Court's conclusion that the Shared Time program in *Ball* had the impermissible effect of advancing religion rested on three assumptions: (i) any public employee who works on the premises of a religious school is presumed to inculcate religion in her work; (ii) the presence of public employees on private school premises creates a symbolic union between church and state; and (iii) any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking. Additionally, in *Aguilar* there was a fourth assumption: that New York City's Title I program necessitated an excessive government entanglement with religion because public employees who teach on the premises of religious schools must be closely monitored to ensure that they do not inculcate religion.

B

Our more recent cases have undermined the assumptions upon which *Ball* and *Aguilar* relied. To be sure, the general principles we use to evaluate whether government aid violates the Establishment Clause have not changed since *Aguilar* was decided. For example, we continue to ask whether the government acted with the purpose of advancing or inhibiting religion, and the nature of that inquiry has remained largely unchanged. See *Witters*, 474 U. S., at 485–486; *Bowen* v. *Kendrick*, 487 U. S. 589, 602–604 (1988) (concluding that Adolescent Family Life Act had a secular purpose); *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226, 248–249 (1990) (concluding that Equal Access Act has a secular purpose); cf. *Edwards* v. *Aguillard*, 482 U. S. 578 (1987) (striking down Louisiana law that required creationism to be discussed with evolution in public schools because the law lacked a legitimate secular purpose). Likewise, we continue to explore whether the aid has the "effect" of advancing or inhibiting religion. What has changed since we decided *Ball* and *Aguilar* is our understanding of the criteria used to assess whether aid to religion has an impermissible effect.

1

As we have repeatedly recognized, government inculcation of religious beliefs has the impermissible effect of advancing religion. Our cases subsequent to *Aguilar* have, however, modified in two significant respects the approach we use to assess indoctrination. First, we have abandoned the presumption erected in *Meek* and *Ball* that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion. In *Zobrest* v. *Catalina Foothills School Dist.*, 509 U. S. 1 (1993), we examined whether the IDEA, 20 U. S. C. § 1400 *et seq.*, was constitutional as applied to a deaf student who sought to bring his state-employed sign-language interpreter with him to his Roman Catholic high school. We held that this was permissible, expressly disavowing the notion that "the Establishment Clause [laid] down [an] absolute bar to the placing of a public employee in a sectarian school." 509 U. S., at 13. "Such a flat rule, smacking of antiquated notions of 'taint,' would indeed exalt form over substance." *Ibid.* We refused to presume that a publicly employed interpreter would be pressured by the pervasively sectarian surroundings to inculcate religion by "add[ing] to [or] subtract[ing] from" the lectures translated. *Ibid.* In the absence of evidence to the contrary, we assumed instead that the interpreter would dutifully discharge her responsibilities as a full-time public employee and comply with the ethical guidelines of her profession by accurately translating what was said. *Id.*, at 12. Because the only *government* aid in *Zobrest* was the interpreter, who was herself not inculcating any religious messages, no *government* indoctrination took place and we were able to conclude that "the provision of such assistance [was] not barred by the Establishment Clause." *Id,* at 13. *Zobrest* therefore expressly rejected the notion—relied on in *Ball* and *Aguilar*—that, solely because of her presence on private school property, a public employee will be presumed to inculcate religion in the students. *Zobrest* also implicitly repudiated another assumption on which *Ball* and *Aguilar* turned: that the presence of a public employee on private school property creates an impermissible "symbolic link" between government and religion.

JUSTICE SOUTER contends that *Zobrest* did not undermine the "presumption of inculcation" erected in *Ball* and *Aguilar,* and that our conclusion to the contrary rests on a "mistaken reading" of *Zobrest.* *Post,* at 248 (dissenting opinion). In his view, *Zobrest* held that the Establishment Clause tolerates the presence of public employees in sectarian schools "only . . . in . . . limited circumstances"—*i. e.*, when the employee "simply translates for one student the material presented to the class for the benefit of all students." *Post,* at 249. The sign-language interpreter in *Zobrest* is unlike the remedial instructors in *Ball* and *Aguilar* because signing, JUSTICE SOUTER explains, "[cannot] be understood as an opportunity to inject religious content in what [is] supposed to be secular instruction." *Post,* at 248–249. He is thus able to conclude that *Zobrest* is distinguishable from—and therefore perfectly consistent with—*Ball* and *Aguilar.*

In *Zobrest,* however, we did not expressly or implicitly rely upon the basis JUSTICE SOUTER now advances for distinguishing *Ball* and *Aguilar.* If we had thought that signers had no "opportunity to inject religious content" into their translations, we would have had no reason to consult the record for evidence of inaccurate translations. 509 U. S., at 13. The signer in *Zobrest* had the same opportunity to inculcate religion in the performance of her duties as do Title I employees, and there is no genuine basis upon which to confine *Zobrest*'s underlying rationale—that public employees will not be presumed to inculcate religion—to sign-language interpreters. Indeed, even the *Zobrest* dissenters acknowledged the shift *Zobrest* effected in our Establishment Clause law when they criticized the majority for "stray[ing] . . . from the course set by nearly five decades of Establishment Clause jurisprudence." *Id.,* at 24 (Blackmun, J., dissenting). Thus, it was *Zobrest*—and not this litigation—that created "fresh law." *Post,* at 249. Our refusal to limit *Zobrest* to its facts despite its rationale does not, in our view, amount to a "misreading" of precedent.

Second, we have departed from the rule relied on in *Ball* that all government aid that directly assists the educational function of religious schools is invalid. In *Witters* v. *Washington Dept. of Servs. for Blind,* 474 U. S. 481 (1986), we held that the Establishment Clause did not bar a State from issuing a vocational tuition grant to a blind person who wished to use the grant to attend a Christian college and become a pastor, missionary, or youth director. Even though the grant recipient clearly would use the money to obtain religious education, we observed that the tuition grants were "'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.'" *Id.,* at 487 (quoting *Committee for Public Ed. & Religious Liberty* v. *Nyquist,* 413 U. S. 756, 782–783,

n. 38 (1973)). The grants were disbursed directly to students, who then used the money to pay for tuition at the educational institution of their choice. In our view, this transaction was no different from a State's issuing a paycheck to one of its employees, knowing that the employee would donate part or all of the check to a religious institution. In both situations, any money that ultimately went to religious institutions did so "only as a result of the genuinely independent and private choices of" individuals. 474 U. S., at 487. The same logic applied in *Zobrest,* where we allowed the State to provide an interpreter, even though she would be a mouthpiece for religious instruction, because the IDEA's neutral eligibility criteria ensured that the interpreter's presence in a sectarian school was a "result of the private decision of individual parents" and "[could not] be attributed to *state* decisionmaking." 509 U. S., at 10 (emphasis added). Because the private school would not have provided an interpreter on its own, we also concluded that the aid in *Zobrest* did not indirectly finance religious education by "reliev[ing] [the] sectarian schoo[l] of costs [it] otherwise would have borne in educating [its] students." *Id.,* at 12.

Zobrest and *Witters* make clear that, under current law, the Shared Time program in *Ball* and New York City's Title I program in *Aguilar* will not, as a matter of law, be deemed to have the effect of advancing religion through indoctrination. Indeed, each of the premises upon which we relied in *Ball* to reach a contrary conclusion is no longer valid. First, there is no reason to presume that, simply because she enters a parochial school classroom, a full-time public employee such as a Title I teacher will depart from her assigned duties and instructions and embark on religious indoctrination, any more than there was a reason in *Zobrest* to think an interpreter would inculcate religion by altering her translation of classroom lectures. Certainly, no evidence has ever shown that any New York City Title I instructor teaching on parochial school premises attempted to inculcate religion in students. *National Coalition for Public Ed. & Religious Liberty* v. *Harris,* 489 F. Supp. 1248, 1262, 1267 (SDNY 1980); *Felton* v. *Secretary, United States Dept. of Ed.,* 739 F. 2d, at 53, aff'd *sub nom. Aguilar* v. *Felton,* 473 U. S. 402 (1985). Thus, both our precedent and our experience require us to reject respondents' remarkable argument that we must presume Title I instructors to be "uncontrollable and sometimes very unprofessional." Tr. of Oral Arg. 39.

As discussed above, *Zobrest* also repudiates *Ball's* assumption that the presence of Title I teachers in parochial school classrooms will, without more, create the impression of a "symbolic union" between church and state. JUSTICE SOUTER maintains that *Zobrest* is not dispositive on this point because *Aguilar's* implicit conclusion that New York City's Title I program created a "symbolic union" rested on more than the presence of Title I employees on parochial school grounds. *Post,* at 250. To him, Title I continues to foster a "symbolic union" between the Board and sectarian schools because it mandates "the involvement of public teachers in the instruction provided within sectarian schools," *ibid.,* and "fus[es] public and private faculties," *post,* at 254. JUSTICE SOUTER does not disavow the notion, uniformly adopted by lower courts, that Title I services may be provided to sectarian school students in off-campus locations, *post,* at 246–247, even though that notion necessarily presupposes that the danger of "symbolic union" evaporates once the services are provided off campus. Taking this view, the only difference between a constitutional program and an unconstitutional one is the location of the classroom, since the degree of cooperation between Title I instructors and parochial school faculty is the same no matter where the services are provided. We do not see any perceptible (let alone dispositive) difference in the degree of symbolic union between a student receiving remedial instruction in a classroom on his sectarian school's campus and one receiving instruction in a van parked just at the school's curbside. To draw this line based solely on the location of the public employee is neither "sensible" nor "sound," *post,* at 247, and the Court in *Zobrest* rejected it.

Nor under current law can we conclude that a program placing full-time public employees on parochial campuses to provide Title I instruction would impermissibly finance religious indoctrination. In all relevant respects, the provision of instructional services under Title I is indistinguishable from the provision of sign-language interpreters under the IDEA. Both programs make aid available only to eligible recipients. That aid is provided to students at whatever school they choose to attend. Although Title I instruction is provided to several students at once, whereas an interpreter provides translation to a single student, this distinction is not constitutionally significant. Moreover, as in *Zobrest,* Title I services are by law supplemental to the regular curricula. 34 CFR §200.12(a) (1996). These services do not, therefore, "reliev[e] sectarian schools of costs they otherwise would have borne in educating their students." 509 U. S., at 12.

JUSTICE SOUTER finds our conclusion that the IDEA and Title I programs are similar to be "puzzling," and points to three differences he perceives between the programs: (i) Title I services are distributed by LEA's "directly to the religious schools" instead of to individual students pursuant to a formal application process; (ii) Title I services "necessarily reliev[e] a religious school of 'an expense that it otherwise would have assumed' "; and (iii) Title I provides services to more students than did the programs in *Witters* and *Zobrest. Post,* at 251–252. None of these distinctions is meaningful. While it is true that individual students may not directly apply for Title I services, it does not follow from this premise that those services are distributed "directly to the religious schools," *post,* at 252. In fact, they are not. No Title I funds ever reach the coffers of religious schools, cf. *Committee for Public Ed. and Religious Liberty* v. *Regan,* 444 U. S. 646, 657–659 (1980) (involving a program giving "direct cash reimbursement" to *religious schools* for performing certain state-mandated tasks), and Title I services may not be provided to religious schools on a schoolwide basis, 34 CFR § 200.12(b) (1996). Title I funds are instead distributed to a *public* agency (an LEA) that dispenses services directly to the eligible students within its boundaries, no matter where they choose to attend school. 20 U. S. C. §§ 6311, 6312. Moreover, we fail to see how providing Title I services directly to eligible students results in a greater financing of religious indoctrination simply because those students are not first required to submit a formal application.

We are also not persuaded that Title I services supplant the remedial instruction and guidance counseling already provided in New York City's sectarian schools. Although JUSTICE SOUTER maintains that the sectarian schools provide such services and that those schools reduce those services once their students begin to receive Title I instruction, see *post,* at 244, 246, 251–252, 254, his claims rest on speculation about the impossibility of drawing any line between supplemental and general education, see *post,* at 246, and not on any evidence in the record that the Board is in fact violating Title I regulations by providing services that supplant those offered in the sectarian schools. See 34 CFR § 200.12(a) (1996). We are unwilling to speculate that all sectarian schools provide remedial instruction and guidance counseling to their students, and are unwilling to presume that the Board would violate Title I regulations by continuing to provide Title I services to students who attend a sectarian school that has curtailed its remedial instruction program in response to Title I. Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid. *Zobrest* did not turn on the fact that James Zobrest had, at the time of litigation, been the only child using a publicly funded sign-language interpreter to attend a parochial school. Accord, *Mueller* v. *Allen,* 463

U. S. 388, 401 (1983) ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law").

What is most fatal to the argument that New York City's Title I program directly subsidizes religion is that it applies with equal force when those services are provided off campus, and *Aguilar* implied that providing the services off campus is entirely consistent with the Establishment Clause. JUSTICE SOUTER resists the impulse to upset this implication, contending that it can be justified on the ground that Title I services are "less likely to supplant some of what would otherwise go on inside [the sectarian schools] and to subsidize what remains" when those services are offered off campus. *Post,* at 247. But JUSTICE SOUTER does not explain why a sectarian school would not have the same incentive to "make patently significant cutbacks" in its curriculum no matter where Title I services are offered, since the school would ostensibly be excused from having to provide the Title I-type services itself. See *ibid.* Because the incentive is the same either way, we find no logical basis upon which to conclude that Title I services are an impermissible subsidy of religion when offered on campus, but not when offered off campus. Accordingly, contrary to our conclusion in *Aguilar,* placing full-time employees on parochial school campuses does not as a matter of law have the impermissible effect of advancing religion through indoctrination.

2

Although we examined in *Witters* and *Zobrest* the criteria by which an aid program identifies its beneficiaries, we did so solely to assess whether any use of that aid to indoctrinate religion could be attributed to the State. A number of our Establishment Clause cases have found that the criteria used for identifying beneficiaries are relevant in a second respect, apart from enabling a court to evaluate whether the program subsidizes religion. Specifically, the criteria might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination. Cf. *Witters*, 474 U. S., at 488 (upholding neutrally available program because it did not "creat[e a] financial incentive for students to undertake sectarian education"); *Zobrest, supra,* at 10 (upholding neutrally available IDEA aid because it "creates no financial incentive for parents to choose a sectarian school"); accord, *post,* at 253 (SOUTER, J., dissenting) ("[E]venhandedness is a necessary but not a sufficient condition for an aid program to satisfy constitutional scrutiny"). This incentive is not present, however, where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis. Under such circumstances, the aid is less likely to have the effect of advancing religion. See *Widmar* v. *Vincent,* 454 U. S. 263, 274 (1981) ("The provision of benefits to so broad a spectrum of groups is an important index of secular effect").

In *Ball* and *Aguilar,* the Court gave this consideration no weight. Before and since those decisions, we have sustained programs that provided aid to *all* eligible children regardless of where they attended school. See, *e. g., Everson* v. *Board of Ed. of Ewing,* 330 U. S. 1, 16–18 (1947) (sustaining local ordinance authorizing all parents to deduct from their state tax returns the costs of transporting their children to school on public buses); *Board of Ed. of Central School Dist. No. 1* v. *Allen,* 392 U. S. 236, 243–244 (1968) (sustaining New York law loaning secular textbooks to all children); *Mueller* v. *Allen, supra,* at 398–399 (sustaining Minnesota statute allowing all parents to deduct actual costs of tuition, textbooks, and transportation from state tax returns); *Witters, supra,* at 487–488 (sustaining Washington law granting all eligible blind persons vocational assistance); *Zobrest,* 509 U. S., at 10 (sustaining section of IDEA providing all "disabled" children with necessary aid).

Applying this reasoning to New York City's Title I program, it is clear that Title I services are allocated on the basis of criteria that neither favor nor disfavor religion. 34 CFR § 200.10(b) (1996); see *supra*, at 209–210. The services are available to all children who meet the Act's eligibility requirements, no matter what their religious beliefs or where they go to school, 20 U. S. C. § 6312(c)(1)(F). The Board's program does not, therefore, give aid recipients any incentive to modify their religious beliefs or practices in order to obtain those services.

3

We turn now to *Aguilar*'s conclusion that New York City's Title I program resulted in an excessive entanglement between church and state. Whether a government aid program results in such an entanglement has consistently been an aspect of our Establishment Clause analysis. We have considered entanglement both in the course of assessing whether an aid program has an impermissible effect of advancing religion, *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664, 674 (1970), and as a factor separate and apart from "effect," *Lemon* v. *Kurtzman*, 403 U. S., at 612–613. Regardless of how we have characterized the issue, however, the factors we use to assess whether an entanglement is "excessive" are similar to the factors we use to examine "effect." That is, to assess entanglement, we have looked to "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." *Id.*, at 615. Similarly, we have assessed a law's "effect" by examining the character of the institutions benefited (*e. g.*, whether the religious institutions were "predominantly religious"), see *Meek*, 421 U. S., at 363–364; cf. *Hunt* v. *McNair*, 413 U. S. 734, 743–744 (1973), and the nature of the aid that the State provided (*e. g.*, whether it was neutral and nonideological), see *Everson*, *supra*, at 18; *Wolman*, 433

U. S., at 244. Indeed, in *Lemon* itself, the entanglement that the Court found "independently" to necessitate the program's invalidation also was found to have the effect of inhibiting religion. See, *e. g.*, 403 U. S., at 620 ("[W]e cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion . . ."). Thus, it is simplest to recognize why entanglement is significant and treat it—as we did in *Walz*—as an aspect of the inquiry into a statute's effect.

Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, see 403 U. S., at 614, and we have always tolerated some level of involvement between the two. Entanglement must be "excessive" before it runs afoul of the Establishment Clause. See, *e. g.*, *Bowen* v. *Kendrick*, 487 U. S., at 615–617 (no excessive entanglement where government reviews the adolescent counseling program set up by the religious institutions that are grantees, reviews the materials used by such grantees, and monitors the program by periodic visits); *Roemer* v. *Board of Public Works of Md.*, 426 U. S. 736, 764–765 (1976) (no excessive entanglement where State conducts annual audits to ensure that categorical state grants to religious colleges are not used to teach religion).

The pre-*Aguilar* Title I program does not result in an "excessive" entanglement that advances or inhibits religion. As discussed previously, the Court's finding of "excessive" entanglement in *Aguilar* rested on three grounds: (i) the program would require "pervasive monitoring by public authorities" to ensure that Title I employees did not inculcate religion; (ii) the program required "administrative cooperation" between the Board and parochial schools; and (iii) the program might increase the dangers of "political divisiveness." 473 U. S., at 413–414. Under our current understanding of the Establishment Clause, the last two considerations are insufficient by themselves to create an "excessive" entanglement. They are present no matter where Title I services are offered, and no court has held that Title I services cannot be offered off campus. *Aguilar, supra* (limiting holding to on-premises services); *Walker* v. *San Francisco Unified School Dist.*, 46 F. 3d 1449 (CA9 1995) (same); *Pulido* v. *Cavazos*, 934 F. 2d 912, 919–920 (CA8 1991); *Committee for Public Ed. & Religious Liberty* v. *Secretary, United States Dept. of Ed.*, 942 F. Supp. 842 (EDNY 1996) (same). Further, the assumption underlying the first consideration has been undermined. In *Aguilar*, the Court presumed that full-time public employees on parochial school grounds would be tempted to inculcate religion, despite the ethical standards they were required to uphold. Because of this risk *pervasive* monitoring would be required. But after *Zobrest* we no longer presume that public employees will inculcate religion simply because they happen to be in a sectarian environment. Since we have abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully, we must also discard the assumption that *pervasive* monitoring of Title I teachers is required. There is no suggestion in the record before us that unannounced monthly visits of public supervisors are insufficient to prevent or to detect inculcation of religion by public employees. Moreover, we have not found excessive entanglement in cases in which States imposed far more onerous burdens on religious institutions than the monitoring system at issue here. See *Bowen, supra*, at 615–617.

To summarize, New York City's Title I program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: It does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement. We therefore hold that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here. The same considerations that justify this holding require us to conclude that this carefully constrained program also cannot reasonably be viewed as an endorsement of religion. Accord, *Witters*, 474 U. S., at 488–489 ("[T]he mere circumstance that [an aid recipient] has chosen to use neutrally available state aid to help pay for [a] religious education [does not] confer any message of state endorsement of religion"); *Bowen, supra,* at 613–614 (finding no " 'symbolic link' " when Congress made federal funds neutrally available for adolescent counseling). Accordingly, we must acknowledge that *Aguilar,* as well as the portion of *Ball* addressing Grand Rapids' Shared Time program, are no longer good law.

C

The doctrine of *stare decisis* does not preclude us from recognizing the change in our law and overruling *Aguilar* and those portions of *Ball* inconsistent with our more recent decisions. As we have often noted, "*[s]tare decisis* is not an inexorable command," *Payne* v. *Tennessee,* 501 U. S. 808, 828 (1991), but instead reflects a policy judgment that "in most matters it is more important that the applicable rule of law be settled than that it be settled right," *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting). That policy is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions. *Seminole Tribe of Fla.* v. *Florida,* 517 U. S. 44, 63 (1996); *Payne, supra,* at 828; *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 94 (1936) (Stone and Cardozo, JJ., concurring in result) ("The doctrine of *stare decisis* . . . has only a limited application in the field of constitutional law"). Thus, we have held in several cases that *stare decisis* does not prevent us from overruling a previous decision where there has been a significant change in, or subsequent development of, our constitutional law. *United States* v. *Gaudin,* 515 U. S. 506, 521 (1995) (*stare decisis* may yield where a prior decision's "underpinnings [have been] eroded, by subsequent decisions of this Court"); *Alabama* v. *Smith,* 490 U. S. 794, 803 (1989) (noting that a "later development of . . . constitutional law" is a basis for overruling a decision); *Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U. S. 833, 857 (1992) (observing that a decision is properly overruled where "development of constitutional law since the case was decided has implicitly or explicitly left [it] behind as a mere survivor of obsolete constitutional thinking"). As discussed above, our Establishment Clause jurisprudence has changed significantly since we decided *Ball* and *Aguilar,* so our decision to overturn those cases rests on far more than "a present doctrinal disposition to come out differently from the Court of [1985]." *Casey, supra,* at 864. We therefore overrule *Ball* and *Aguilar* to the extent those decisions are inconsistent with our current understanding of the Establishment Clause.

Nor does the "law of the case" doctrine place any additional constraints on our ability to overturn *Aguilar.* Under this doctrine, a court should not reopen issues decided in earlier stages of the same litigation. *Messenger* v. *Anderson,* 225 U. S. 436, 444 (1912). The doctrine does not apply if the court is "convinced that [its prior decision] is clearly erroneous and would work a manifest injustice." *Arizona* v. *California,* 460 U. S. 605, 618, n. 8 (1983). In light of our conclusion that *Aguilar* would be decided differently under our current Establishment Clause law, we think adherence to that decision would undoubtedly work a "manifest injustice," such that the law of the case doctrine does not apply. Accord, *Davis* v. *United States,* 417 U. S. 333, 342 (1974) (Court of Appeals erred in adhering to law of the case doctrine despite intervening Supreme Court precedent).

IV

We therefore conclude that our Establishment Clause law has "significant[ly] change[d]" since we decided *Aguilar.* See *Rufo,* 502 U. S., at 384. We are only left to decide whether this change in law entitles petitioners to relief under Rule 60(b)(5). We conclude that it does. Our general practice is to apply the rule of law we announce in a case to the parties before us. *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 485 (1989) ("The general rule of long standing is that the law announced in the Court's decision controls the case at bar"). We adhere to this practice even when we overrule a case. In *Adarand Constructors, Inc.* v. *Peña,* 515 U. S. 200 (1995), for example, the District Court and Court of Appeals rejected the argument that racial classifications in federal programs should be evaluated under strict scrutiny, relying upon our decision in *Metro Broadcasting, Inc.* v. *FCC,* 497 U. S. 547 (1990). When we granted certiorari and overruled *Metro Broadcasting,* we did not hesitate to vacate the judgments of the lower courts. In doing so, we necessarily concluded that those courts relied on a legal principle that had not withstood the test of time. 515 U. S., at 237–238. See also *Hubbard* v. *United States,* 514 U. S. 695, 715 (1995) (overruling decision relied upon by Court of Appeals and reversing the lower court's judgment that relied upon the overruled case).

We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas, supra,* at 484. Adherence to this teaching by the District Court and Court of Appeals in this litigation does not insulate a legal principle on which they relied from our review to determine its continued vitality. The trial court acted within its discretion in entertaining the motion with supporting allegations, but it was also correct to recognize that the motion had to be denied unless and until this Court reinterpreted the binding precedent.

Respondents and JUSTICE GINSBURG urge us to adopt a different analysis because we are reviewing the District Court's denial of petitioners' Rule 60(b)(5) motion for an abuse of discretion. See *Browder* v. *Director, Dept. of Corrections of Ill.*, 434 U. S. 257, 263, n. 7 (1978). It is true that the trial court has discretion, but the exercise of discretion cannot be permitted to stand if we find it rests upon a legal principle that can no longer be sustained. See *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384, 405 (1990). The standard of review we employ in this litigation does not therefore require us to depart from our general practice. See *Adarand, supra; Hubbard, supra.*

Respondents nevertheless contend that we should not grant Rule 60(b)(5) relief here, in spite of its propriety in other contexts. They contend that petitioners have used Rule 60(b)(5) in an unprecedented way—not as a means of *recognizing* changes in the law, but as a vehicle for *effecting* them. If we were to sanction this use of Rule 60(b)(5), respondents argue, we would encourage litigants to burden the federal courts with a deluge of Rule 60(b)(5) motions premised on nothing more than the claim that various judges or Justices have stated that the law has changed. See also *post,* at 260 (GINSBURG, J., dissenting) (contending that granting Rule 60(b)(5) relief in this litigation will encourage "invitations to reconsider old cases based on 'speculat[ions] on chances from changes in [the Court's membership]"). We think their fears are overstated. As we noted above, a judge's stated belief that a case should be overruled does not make it so. See *supra,* at 217.

Most importantly, our decision today is intimately tied to the context in which it arose. This litigation involves a party's request under Rule 60(b)(5) to vacate a continuing injunction entered some years ago in light of a bona fide, significant change in subsequent law. The clause of Rule 60(b)(5) that petitioners invoke applies by its terms only to "judgment[s] hav[ing] prospective application." Intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6), the only remaining avenue for relief on this basis from judgments lacking any prospective component. See 12 J. Moore et al., Moore's Federal Practice § 60.48[5][b], p. 60–181 (3d ed. 1997) (collecting cases). Our decision will have no effect outside the context of ordinary civil litigation where the propriety of continuing prospective relief is at issue. Cf. *Teague* v. *Lane*, 489 U. S. 288 (1989) (applying a more stringent standard for recognizing changes in the law and "new rules" in light of the "interests of comity" present in federal habeas corpus proceedings). Given that Rule 60(b)(5) specifically contemplates the grant of relief in the circumstances presented here, it can hardly be said that we have somehow warped the Rule into a means of "allowing an 'anytime' rehearing." See *post*, at 259 (GINSBURG, J., dissenting).

Respondents further contend that "[p]etitioners' [p]roposed [u]se of Rule 60(b) [w]ill [e]rode the [i]nstitutional [i]ntegrity of the Court." Brief for Respondents 26. Respondents do not explain how a proper application of Rule 60(b)(5) undermines our legitimacy. Instead, respondents focus on the harm occasioned if we were to overrule *Aguilar*. But as discussed above, we do no violence to the doctrine of *stare decisis* when we recognize bona fide changes in our decisional law. And in those circumstances, we do no violence to the legitimacy we derive from reliance on that doctrine. *Casey*, 505 U. S., at 865–866.

As a final matter, we see no reason to wait for a "better vehicle" in which to evaluate the impact of subsequent cases on *Aguilar*'s continued vitality. To evaluate the Rule

60(b)(5) motion properly before us today in no way undermines "integrity in the interpretation of procedural rules" or signals any departure from "the responsive, non-agenda-setting character of this Court." *Post*, at 260 (GINSBURG, J., dissenting). Indeed, under these circumstances, it would be particularly inequitable for us to bide our time waiting for another case to arise while the city of New York labors under a continuing injunction forcing it to spend millions of dollars on mobile instructional units and leased sites when it could instead be spending that money to give economically disadvantaged children a better chance at success in life by means of a program that is perfectly consistent with the Establishment Clause.

For these reasons, we reverse the judgment of the Court of Appeals and remand the cases to the District Court with instructions to vacate its September 26, 1985, order.

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, and with whom JUSTICE BREYER joins as to Part II, dissenting.

In this novel proceeding, petitioners seek relief from an injunction the District Court entered 12 years ago to implement our decision in *Aguilar* v. *Felton*, 473 U. S. 402 (1985). For the reasons given by JUSTICE GINSBURG, see *post*, p. 255, the Court's holding that petitioners are entitled to relief under Federal Rule of Civil Procedure 60(b) is seriously mistaken. The Court's misapplication of the Rule is tied to its equally erroneous reading of our more recent Establishment Clause cases, which the Court describes as having rejected the underpinnings of *Aguilar* and portions of *Aguilar*'s companion case, *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373 (1985). The result is to repudiate the very reasonable line drawn in *Aguilar* and *Ball*, and to authorize direct state aid to religious institutions on an un-paralleled scale, in violation of the Establishment Clause's central prohibition against religious subsidies by the government.

I respectfully dissent.

I

In both *Aguilar* and *Ball,* we held that supplemental instruction by public school teachers on the premises of religious schools during regular school hours violated the Establishment Clause. *Aguilar,* of course, concerned the very school system before us here and the same Title I program at issue now, see *ante,* at 211–212, under which local educational agencies receive public funds to provide remedial education, guidance, and job counseling to eligible students, including those attending religious schools. Immediately before *Aguilar,* New York City used Title I funds to provide guidance services and classes in remedial reading, remedial mathematics, and English as a second language to students at religious schools, as it did by sending employees of the public school system, including teachers, guidance counselors, psychologists, and social workers, into the religious schools. See *Aguilar, supra,* at 406. *Ball* involved a program similar in many respects to Title I called Shared Time,[1] under which the local school district provided religious school students with "supplementary" classes in their religious schools, taught by teachers who were full-time employees of the public schools, in subjects including remedial math and reading, art, music, and physical education. See 473 U. S., at 375.

We held that both schemes ran afoul of the Establishment Clause. The Shared Time program had the impermissible effect of promoting religion in three ways: first, state-paid teachers conducting classes in a sectarian environment might inadvertently (or intentionally) manifest sympathy with the sectarian aims to the point of using public funds for religious educational purposes, *id.*, at 388; second, the government's provision of secular instruction in religious schools produced a symbolic union of church and state that tended to convey a message to students and to the public that the State supported religion, *id.*, at 390–392; and, finally, the Shared Time program subsidized the religious functions of the religious schools by assuming responsibility for teaching secular subjects the schools would otherwise be required to provide, *id.*, at 395–396. Our decision in *Aguilar* noted the similarity between the Title I and Shared Time programs, and held that the system New York City had adopted to monitor the religious content of Title I classes held in religious schools would necessarily result in excessive entanglement of church and state, and violate the Establishment Clause for that reason. See 473 U. S., at 412–414.

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[1] *School Dist. of Grand Rapids* v. *Ball,* 473 U. S. 373 (1985), also invalidated a separate program called Community Education that is distinct from the Title I program at issue today. I do not understand the Court's discussion to implicate *Ball's* evaluation of the Community Education program.

As I will indicate as I go along, I believe *Aguilar* was a correct and sensible decision, and my only reservation about its opinion is that the emphasis on the excessive entanglement produced by monitoring religious instructional content obscured those facts that independently called for the application of two central tenets of Establishment Clause jurisprudence. The State is forbidden to subsidize religion directly and is just as surely forbidden to act in any way that could reasonably be viewed as religious endorsement. See, *e. g.*, *Ball*, 473 U. S., at 385 ("Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith"); *id.*, at 389 ("Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrines") (citing *Lynch* v. *Donnelly*, 465 U. S. 668, 688 (1984) (O'CONNOR, J., concurring)).

As is explained elsewhere, the flat ban on subsidization antedates the Bill of Rights and has been an unwavering rule in Establishment Clause cases, qualified only by the conclusion two Terms ago that state exactions from college students are not the sort of public revenues subject to the ban. See *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 868–876 (1995) (SOUTER, J., dissenting); see also *id.*, at 850 (O'CONNOR, J., concurring). The rule expresses the hard lesson learned over and over again in the American past and in the experiences of the countries from which we have come, that religions supported by governments are compromised just as surely as the religious freedom of dissenters is burdened when the government supports religion. "When the government favors a particular religion or sect, the disadvantage to all others is obvious, but even the favored religion may fear being 'taint[ed] . . . with a corrosive secularism.' The favored religion may be compromised as political figures reshape the religion's beliefs for their own purposes; it may be reformed as government largesse brings government regulation." *Lee* v. *Weisman*, 505 U. S. 577, 608 (1992) (Blackmun, J., concurring) (quoting *Ball, supra,* at 385); see also Memorial and Remonstrance against Religious Assessments 1785, in The Complete Madison 299, 309 (S. Padover ed. 1953) ("Religion flourishes in greater purity, without than with the aid of Gov[ernment]"); M. Howe, The Garden and the Wilderness 6 (1965) (noting Roger Williams's view that "worldly corruptions . . . might consume the churches if sturdy fences against the wilderness were not maintained"). The ban against state endorsement of religion addresses the same historical lessons. Governmental approval of religion tends to reinforce the religious message (at least in the short run) and, by the same token, to carry a message of exclusion to those of less favored views. See, *e. g., Ball, supra,* at 390 ("[A]n important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices"); *Lee, supra,* at 606–607 (Blackmun, J., concurring) ("When the government puts its *imprimatur* on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs. A government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some"); *Engel* v. *Vitale,* 370 U. S. 421, 429 (1962) ("[A]nguish, hardship and bitter strife" result "when zealous religious groups struggl[e] with one another to obtain the Government's stamp of approval"). The human tendency, of course, is to forget the hard lessons, and to overlook the history of governmental partnership with religion when a cause is worthy, and bureaucrats have programs. That tendency to forget is the reason for having the Establishment Clause (along with the Constitution's other structural and libertarian guarantees), in the hope of stopping the corrosion before it starts.

These principles were violated by the programs at issue in *Aguilar* and *Ball,* as a consequence of several significant features common to both Title I, as implemented in New York City before *Aguilar,* and the Grand Rapids Shared Time program: each provided classes on the premises of the religious schools, covering a wide range of subjects including some at the core of primary and secondary education, like reading and mathematics; while their services were termed "supplemental," the programs and their instructors necessarily assumed responsibility for teaching subjects that the religious schools would otherwise have been obligated to provide, cf. *Wolman* v. *Walter,* 433 U. S. 229, 243 (1977) (provision of diagnostic tests to religious schools provides only an incidental benefit); the public employees carrying out the programs had broad responsibilities involving the exercise of considerable discretion, cf. *Zobrest* v. *Catalina Foothills School Dist.,* 509 U. S. 1, 13 (1993) (sign-language interpreter must transmit exactly what is said); *Lemon* v. *Kurtzman,* 403 U. S. 602, 616–617 (1971) (distinguishing, for Establishment Clause purposes, books provided by the State to students from teachers paid by the State); while the programs offered aid to nonpublic school students generally (and Title I went to public school students as well), participation by religious school students in each program was extensive, cf. *Witters* v. *Washington Dept. of Servs. for Blind,* 474 U. S. 481, 488 (1986) (only one student sought state tuition assistance for religious education); and, finally, aid under Title I and Shared Time flowed directly to the schools in the form of classes and programs, as distinct from indirect aid that reaches schools only as a result of independent private choice, cf. *Zobrest, supra,* at 12 ("[A]ny attenuated financial benefit that parochial schools do ultimately receive . . . is attributable to 'the private choices of individual parents'") (quoting *Mueller* v. *Allen,* 463 U. S. 388, 400 (1983)); *Witters, supra,* at 487 (aid issued to students reached religious institution "only as a result of the genuinely independent and private choices of aid recipients"); *Mueller, supra,* at 399–400 (same).

What, therefore, was significant in *Aguilar* and *Ball* about the placement of state-paid teachers into the physical and social settings of the religious schools was not only the consequent temptation of some of those teachers to reflect the schools' religious missions in the rhetoric of their instruction, with a resulting need for monitoring and the certainty of entanglement. See *Aguilar,* 473 U. S., at 412–414 (monitoring); *Ball,* 473 U. S., at 388 (risk of indoctrination). What was so remarkable was that the schemes in issue assumed a teaching responsibility indistinguishable from the responsibility of the schools themselves. The obligation of primary and secondary schools to teach reading necessarily extends to teaching those who are having a hard time at it, and the same is true of math. Calling some classes remedial does not distinguish their subjects from the schools' basic subjects, however inadequately the schools may have been addressing them.

What was true of the Title I scheme as struck down in *Aguilar* will be just as true when New York reverts to the old practices with the Court's approval after today. There is simply no line that can be drawn between the instruction paid for at taxpayers' expense and the instruction in any subject that is not identified as formally religious. While it would be an obvious sham, say, to channel cash to religious schools to be credited only against the expense of "secular" instruction, the line between "supplemental" and general education is likewise impossible to draw. If a State may constitutionally enter the schools to teach in the manner in question, it must in constitutional principle be free to assume, or assume payment for, the entire cost of instruction provided in any ostensibly secular subject in any religious school. This Court explicitly recognized this in *Ball, supra,* at 394, 396, and although in *Aguilar* the Court concentrated on entanglement it noted the similarity to *Ball,* see *Aguilar, supra,* at 409, and Judge Friendly's opinion for the Second Circuit made it expressly clear that there was no stopping place in principle once the public teacher entered the religious schools to teach their secular subjects. See *Felton* v. *Secretary, U. S. Dept. of Education,* 739 F. 2d 48, 66–67 (CA2 1984), aff'd *sub nom. Aguilar* v. *Felton,* 473 U. S. 402 (1985).

It may be objected that there is some subsidy in remedial education even when it takes place off the religious premises, some subsidy, that is, even in the way New York City has administered the Title I program after *Aguilar.* In these circumstances, too, what the State does, the religious school need not do; the schools save money and the program makes it easier for them to survive and concentrate their resources on their religious objectives. This argument may, of course, prove too much, but if it is not thought strong enough to bar even off-premises aid in teaching the basics to religious school pupils (an issue not before the Court in *Aguilar* or today), it does nothing to undermine the sense of drawing a line between remedial teaching on and off premises. The off-premises teaching is arguably less likely to open the door to relieving religious schools of their responsibilities for secular subjects simply because these schools are less likely (and presumably legally unable) to dispense with those subjects from their curriculums or to make patently significant cutbacks in basic teaching within the schools to offset the outside instruction; if the aid is delivered outside of the schools, it is less likely to supplant some of what would otherwise go on inside them and to subsidize what remains. On top of that, the difference in the degree of reasonably perceptible endorsement is substantial. Sharing the teaching responsibilities within a school having religious objectives is far more likely to telegraph approval of the school's mission than keeping the State's distance would do. This is clear at every level. As the Court observed in *Ball*, "[t]he symbolism of a union between church and state [effected by placing the public school teachers into the religious schools] is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice." 473 U. S., at 390. When, moreover, the aid goes overwhelmingly to one religious denomination, minimal contact between state and church is less likely to feed the resentment of other religions that would like access to public money for their own worthy projects.

In sum, if a line is to be drawn short of barring all state aid to religious schools for teaching standard subjects, the *Aguilar-Ball* line was a sensible one capable of principled adherence. It is no less sound, and no less necessary, today.

II

The Court today ignores this doctrine and claims that recent cases rejected the elemental assumptions underlying *Aguilar* and much of *Ball*. But the Court errs. Its holding that *Aguilar* and the portion of *Ball* addressing the Shared Time program are "no longer good law," *ante*, at 235, rests on mistaken reading.

A

Zobrest v. *Catalina Foothills School Dist.*, 509 U. S., at 13–14, held that the Establishment Clause does not prevent a school district from providing a sign-language interpreter to a deaf student enrolled in a sectarian school. The Court today relies solely on *Zobrest* to support its contention that we have "abandoned the presumption erected in *Meek* [v. *Pittenger*, 421 U. S. 349 (1975),] and *Ball* that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." *Ante*, at 223. *Zobrest*, however, is no such sanction for overruling *Aguilar* or any portion of *Ball*.

In *Zobrest*, the Court did indeed recognize that the Establishment Clause lays down no absolute bar to placing public employees in a sectarian school, 509 U. S., at 13, and n. 10, but the rejection of such a *per se* rule was hinged expressly on the nature of the employee's job, sign-language interpretation (or signing) and the circumscribed role of the signer. On this point (and without reference to the facts that the benefited student had received the same aid before enrolling in the religious school and the employee was to be assigned to the student, not to the school) the Court explained itself this way: "[T]he task of a sign-language interpreter seems to us quite different from that of a teacher or guidance counselor. . . . Nothing in this record suggests that a sign-language interpreter would do more than accurately interpret whatever material is presented to the class as a whole. In fact, ethical guidelines require interpreters to 'transmit everything that is said in exactly the same way it was intended.'" *Id.*, at 13. The signer could thus be seen as more like a hearing aid than a teacher, and the signing could not be understood as an opportunity to inject religious content in what was supposed to be secular instruction. *Zobrest* accordingly holds only that in these limited circumstances where a public employee simply translates for one student the material presented to the class for the benefit of all students, the employee's presence in the sectarian school does not violate the Establishment Clause. *Id.*, at 13–14. Cf. *Lemon* v. *Kurtzman*, 403 U. S., at 617 ("[T]eachers have a substantially different ideological character from books [and] [i]n terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not").

The Court, however, ignores the careful distinction drawn in *Zobrest* and insists that a full-time public employee such as a Title I teacher is just like the signer, asserting that "there is no reason to presume that, simply because she enters a parochial school classroom, [this] teacher will depart from her assigned duties and instructions and embark on religious indoctrination . . . ." *Ante*, at 226. Whatever may be the merits of this position (and I find it short on merit), it does not enjoy the authority of *Zobrest*. The Court may disagree with *Ball*'s assertion that a publicly employed teacher working in a sectarian school is apt to reinforce the pervasive inculcation of religious beliefs, but its disagreement is fresh law.

The Court tries to press *Zobrest* into performing another service beyond its reach. The Court says that *Ball* and *Aguilar* assumed "that the presence of a public employee on private school property creates an impermissible 'symbolic link' between government and religion," *ante*, at 224, and that *Zobrest* repudiated this assumption, *ibid.* First, *Ball* and *Aguilar* said nothing about the "mere presence" of public employees at religious schools. It was *Ball* that specifically addressed the point and held only that when teachers employed by public schools are placed in religious schools to provide instruction to students during the schoolday a symbolic union of church and state is created and will reasonably be seen by the students as endorsement, see *Ball*, 473 U. S., at 390–392; *Aguilar* adopted the same conclusion by reference, see 473 U. S., at 409. *Zobrest* did not, implicitly or otherwise, repudiate the view that the involvement of public teachers in the instruction provided within sectarian schools looks like a partnership or union and implies approval of the sectarian aim. On the subject of symbolic unions and the strength of their implications, the lesson of *Zobrest* is merely that less is less.

B

The Court next claims that *Ball* rested on the assumption that "any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking." *Ante*, at 222. After *Ball*, the opinion continues, the Court departed from the rule that "all government aid that directly assists the educational function of religious schools is invalid." *Ante*, at 225. But this mischaracterizes *Ball*'s discussion on the point, and misreads *Witters* and *Zobrest* as repudiating the more modest proposition on which *Ball* in fact rested.

Ball did not establish that "any and all" such aid to religious schools necessarily violates the Establishment Clause. It held that the Shared Time program subsidized the religious functions of the parochial schools by taking over a significant portion of their responsibility for teaching secular subjects. See 473 U. S., at 396–397. The Court noted that it had "never accepted the mere possibility of subsidization . . . as sufficient to invalidate an aid program," and instead enquired whether the effect of the proffered aid was " 'direct and substantial' " (and, so, unconstitutional) or merely "indirect and incidental" (and, so, permissible), emphasizing that the question " 'is one of degree.' " *Id.*, at 394 (quoting *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 784–785, n. 39 (1973), and *Zorach* v. *Clauson*, 343

U. S. 306, 314 (1952)). *Witters* and *Zobrest* did nothing to repudiate the principle, emphasizing rather the limited nature of the aid at issue in each case as well as the fact that religious institutions did not receive it directly from the State. In *Witters*, the Court noted that the State would issue the disputed vocational aid directly to one student who would then transmit it to the school of his choice, and that there was no record evidence that "any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education." 474 U. S., at 488. *Zobrest* also presented an instance of a single beneficiary, see 509 U. S., at 4, and emphasized that the student (who had previously received the interpretive services in a public school) determined where the aid would be used, that the aid at issue was limited, and that the religious school was "not relieved of an expense that it otherwise would have assumed in educating its students," *id.*, at 12.

It is, accordingly, puzzling to find the Court insisting that the aid scheme administered under Title I and considered in *Aguilar* was comparable to the programs in *Witters* and *Zobrest.* Instead of aiding isolated individuals within a school system, New York City's Title I program before *Aguilar* served about 22,000 private school students, all but 52 of whom attended religious schools. See App. 313–314.[2] Instead of serving individual blind or deaf students, as such, Title I as administered in New York City before *Aguilar* (and as now to be revived) funded instruction in core subjects (remedial reading, reading skills, remedial mathematics, English as a second language) and provided guidance services. See *Aguilar, supra,* at 406. Instead of providing a service the school would not otherwise furnish, the Title I services necessarily relieved a religious school of "an expense that it otherwise would have assumed," *Zobrest, supra,* at 12, and freed its funds for other, and sectarian, uses.

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[2] The Court's refusal to recognize the extent of student participation as relevant to the constitutionality of an aid program, see *ante*, at 229–230, ignores the contrary conclusion in *Witters* v. *Washington Dept. of Servs. for Blind*, 474 U. S. 481 (1986), on this very point. See *id.*, at 488 (noting, among relevant factors, that "[n]o evidence ha[d] been presented indicating that any other person ha[d] ever sought to finance religious education or activity pursuant to the State's program").

Finally, instead of aid that comes to the religious school indirectly in the sense that its distribution results from private decisionmaking, a public educational agency distributes Title I aid in the form of programs and services directly to the religious schools. In *Zobrest* and *Witters,* it was fair to say that individual students were themselves applicants for individual benefits on a scale that could not amount to a systemic supplement. But under Title I, a local educational agency (which in New York City is the Board of Education) may receive federal funding by proposing programs approved to serve individual students who meet the criteria of need, which it then uses to provide such programs at the religious schools, see App. 28–29, 38, 60, 242–243; students eligible for such programs may not apply directly for Title I funds.[3] The aid, accordingly, is not even formally aid to the individual students (and even formally individual aid must be seen as aid to a school system when so many individuals receive it that it becomes a significant feature of the system, see *Wolman* v. *Walter,* 433 U. S., at 264 (opinion of Powell, J.)).

In sum, nothing since *Ball* and *Aguilar* and before this litigation has eroded the distinction between "direct and substantial" and "indirect and incidental." That principled line is being breached only here and now.

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[3] For this reason, the Court's attempted analogy between Title I and the Individuals with Disabilities Education Act fails, see *ante,* at 228; James Zobrest, unlike students receiving Title I services, applied individually for the interpretative services at issue in *Zobrest* v. *Catalina Foothills School Dist.,* 509 U. S. 1, 4 (1993).

C

The Court notes that aid programs providing benefits solely to religious groups may be constitutionally suspect, while aid allocated under neutral, secular criteria is less likely to have the effect of advancing religion. *Ante*, at 230–231. The opinion then says that *Ball* and *Aguilar* "gave this consideration no weight," *ante*, at 231, and accordingly conflict with a number of decisions. But what exactly the Court thinks *Ball* and *Aguilar* inadequately considered is not clear, given that evenhandedness is a necessary but not a sufficient condition for an aid program to satisfy constitutional scrutiny. Title I services are available to all eligible children regardless of whether they go to religious or public schools, but, as I have explained elsewhere and am not alone in recognizing, see, *e. g.*, *Rosenberger*, 515 U. S., at 846–847 (O'CONNOR, J., concurring); *id.*, at 879–885 (SOUTER, J., dissenting); see also *Bowen* v. *Kendrick*, 487 U. S. 589, 614, 621 (1988), that fact does not define the reach of the Establishment Clause. If a scheme of government aid results in support for religion in some substantial degree, or in endorsement of its value, the formal neutrality of the scheme does not render the Establishment Clause helpless or the holdings in *Aguilar* and *Ball* inapposite.

III

Finally, there is the issue of precedent. *Stare decisis* is no barrier in the Court's eyes because it reads *Aguilar* and *Ball* for exaggerated propositions that *Witters* and *Zobrest* are supposed to have limited to the point of abandoned doctrine. Cf. *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 173–174 (1989). The Court's dispensation from *stare decisis* is, accordingly, no more convincing than its reading of those cases. Since *Aguilar* came down, no case has held that there need be no concern about a risk that publicly paid school teachers may further religious doctrine; no case has repudiated the distinction between direct and substantial aid and aid that is indirect and incidental; no case has held that fusing public and private faculties in one religious school does not create an impermissible union or carry an impermissible endorsement; and no case has held that direct subsidization of religious education is constitutional or that the assumption of a portion of a religious school's teaching responsibility is not direct subsidization.

The continuity of the law, indeed, is matched by the persistence of the facts. When *Aguilar* was decided everyone knew that providing Title I services off the premises of the religious schools would come at substantial cost in efficiency, convenience, and money. Title I had begun off the premises in New York, after all, and dissatisfaction with the arrangement was what led the city to put the public school teachers into the religious schools in the first place. See *Felton* v. *Secretary, U. S. Dept. of Education*, 739 F. 2d, at 51. When *Aguilar* required the end of that arrangement, conditions reverted to those of the past and they have remained unchanged: teaching conditions are often poor, it is difficult to move children around, and it costs a lot of money. That is, the facts became once again what they were once before, as everyone including the Members of this Court knew they would be. No predictions have gone so awry as to excuse the litigation from the claim of precedent, see *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 412 (1932) (Brandeis, J., dissenting), let alone excuse the Court from adhering to its own prior decision in this very litigation.

That is not to deny that the facts just recited are regrettable; the object of Title I is worthy without doubt, and the cost of compliance is high. In the short run there is much that is genuinely unfortunate about the administration of the scheme under *Aguilar*'s rule. But constitutional lines have to be drawn, and on one side of every one of them is an otherwise sympathetic case that provokes impatience with the Constitution and with the line. But constitutional lines are the price of constitutional government.

JUSTICE GINSBURG, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE BREYER join, dissenting.

The Court today finds a way to rehear a legal question decided in respondents' favor in this very case some 12 years ago. See *Aguilar* v. *Felton*, 473 U. S. 402 (1985). Subsequent decisions, the majority says, have undermined *Aguilar* and justify our immediate reconsideration. This Court's Rules do not countenance the rehearing here granted. For good reason, a proper application of those Rules and the Federal Rules of Civil Procedure would lead us to defer reconsideration of *Aguilar* until we are presented with the issue in another case.

We have a rule on rehearing, Rule 44, but it provides only for petitions filed within 25 days of the entry of the judgment in question. See this Court's Rule 44.1. Although the Court or a Justice may "shorte[n] or exten[d]" this period, I am aware of no case in which we have extended the time for rehearing years beyond publication of our adjudication on the merits. Cf. *Reid* v. *Covert*, 354 U. S. 1 (1957) (original decision issued June 11, 1956; rehearing granted Nov. 5, 1956); *Jones* v. *Opelika*, 319 U. S. 103 (1943) *(per curiam)* (original decision issued October Term 1941; rehearing granted October Term 1942). Moreover, nothing in our procedures allows us to grant rehearing, timely or not, "except . . . at the instance of a Justice who concurred in the judgment or decision." This Court's Rule 44.1. Petitioners have not been so bold (or so candid) as to style their plea as one for rehearing in this Court, and the Court has not taken up the petition at the instance of JUSTICE STEVENS, the only still-sitting Member of the *Aguilar* majority.

Lacking any rule or practice allowing us to reconsider the *Aguilar* judgment directly, the majority accepts as a substitute a rule governing relief from judgments or orders of the federal trial courts. See Fed. Rule Civ. Proc. 60(b)(5). The service to which Rule 60(b) has been impressed is unprecedented, and neither the Court nor those urging reconsideration of *Aguilar* contend otherwise. See, *e. g., ante*, at 238; Tr. of Oral Arg. 11 (acknowledgment by counsel for the United States that "we do not know of another instance in which Rule 60(b) has been used in this way"). The Court makes clear, fortunately, that any future efforts to expand today's ruling will not be favored. See *ante*, at 238–239. I therefore anticipate that the extraordinary action taken in this case will remain aberrational.

Rule 60(b) provides, in relevant part:

> "On motion and upon such terms as are just, the [district] court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) . . . it is no longer equitable that the judgment should have prospective application."

Under that Rule, a district court may, in its discretion, grant relief from a final judgment with prospective effect if the party seeking modification can show "a significant change either in factual conditions or in law" that renders continued operation of the judgment inequitable. *Rufo* v. *Inmates of Suffolk County Jail*, 502 U. S. 367, 384 (1992) (addressing modification of consent decree in institutional-reform setting); see 12 J. Moore, Moore's Federal Practice § 60.47[2][c], pp. 60–163 to 60–166 (3d ed. 1997); 11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2863, pp. 336–347 (2d ed. 1995) (hereinafter Wright, Miller, & Kane).

Appellate courts review denials of Rule 60(b) motions for abuse of discretion. See *Browder* v. *Director, Dept. of Corrections of Ill.*, 434 U. S. 257, 263, n. 7 (1978); *Railway Employees* v. *Wright*, 364 U. S. 642, 648–650 (1961). As we recognized in our unanimous opinion in *Browder*, "an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review." 434 U. S., at 263, n. 7. For in this context,

> "[w]e are not framing a decree. We are asking ourselves whether anything has happened that will justify

> us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting." *United States* v. *Swift & Co.*, 286 U. S. 106, 119 (1932).

Cf. *Illinois* v. *Illinois Central R. Co.*, 184 U. S. 77, 91–92 (1902) (cautioning against entertaining successive appeals of legal questions open to dispute in an initial appeal, and observing that tolerance of such appeals would allow parties, *inter alia*, to " 'speculate on chances from changes in [a court's] members' ") (quoting *Roberts* v. *Cooper*, 20 How. 467, 481 (1858)).

In short, relitigation of the legal or factual claims underlying the original judgment is not permitted in a Rule 60(b) motion or an appeal therefrom. See 11 Wright, Miller, & Kane § 2863, p. 340 (Rule 60(b) "does not allow relitigation of issues that have been resolved by the judgment."); see also *Fortin* v. *Commissioner, Mass. Dept. of Public Welfare*, 692 F. 2d 790, 799 (CA1 1982) (warning against transformation of Rule 60(b) "modification procedure into an impermissible avenue of collateral attack"). Thus, under settled practice, the sole question legitimately presented on appeal of the District Court's decision denying petitioners' Rule 60(b)(5) motion to modify the *Aguilar* injunction would be: Did the District Court abuse its discretion when it concluded that neither the facts nor the law had so changed as to warrant alteration of the injunction?

The majority acknowledges that there has been no significant change in factual conditions. See *ante*, at 216–217. The majority also recognizes that *Aguilar* had not been overruled, but remained the governing Establishment Clause law, until this very day. See *ante*, at 217, 236. Because *Aguilar* had not been overruled at the time the District Court acted, the law the District Court was bound to respect had not changed. The District Court therefore did not abuse its discretion in denying petitioners' Rule 60(b) motion.

We have declared that lower courts lack authority to determine whether adherence to a judgment of this Court is inequitable. Those courts must "follow the [Supreme Court] case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 484 (1989); see also *ante*, at 237–238. The District Court would have disobeyed the plain command of *Shearson/American Express* had it granted petitioners' Rule 60(b) motion based upon a view that our more recent Establishment Clause decisions are in tension with *Aguilar.*

Without the teaching of *Shearson/American Express*, Rule 60(b) might have been employed in a case of this kind. Before that firm instruction, lower courts sometimes inquired whether an earlier ruling of this Court had been eroded to the point that it was no longer good law. See, *e. g., Rowe* v. *Peyton*, 383 F. 2d 709, 714 (CA4 1967), aff'd, 391 U. S. 54 (1968); *Perkins* v. *Endicott Johnson Corp.*, 128 F. 2d 208, 217–218 (CA2 1942), aff'd, 317 U. S. 501 (1943); *Healy* v. *Edwards*, 363 F. Supp. 1110, 1117 (ED La. 1973), vacated and remanded for consideration of mootness, 421 U. S. 772 (1975) *(per curiam); Browder* v. *Gayle*, 142 F. Supp. 707, 716–717 (MD Ala.), summarily aff'd, 352 U. S. 903 (1956). *Shearson/American Express* now controls, however, so the District Court and Court of Appeals in this case had no choice but to follow *Aguilar.* Of course, "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law," *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384, 405 (1990) (cited *ante*, at 238), but the District Court made no legal error in determining that *Aguilar* had not been overruled. And our appellate role here is limited to reviewing that determination.

The Court says that the District Court was right to "entertai[n]" the Rule 60(b) motion and also right to reject it, leaving to this Court the option of overruling our previously binding decision. See *ante,* at 238. The Court thus acknowledges that Rule 60(b)(5) had no office to perform in the District Court, given the no-competence instruction of *Shearson/American Express.* All the lower courts could do was pass the case up to us. The Court thus bends Rule 60(b) to a purpose—allowing an "anytime" rehearing in this case—unrelated to the governance of district court proceedings to which the Rule, as part of the Federal Rules of Civil Procedure, is directed. See Fed. Rule Civ. Proc. 1.

In an effort to make today's use of Rule 60(b) appear palatable, the Court describes its decision not as a determination of whether *Aguilar should be* overruled, but as an exploration whether *Aguilar already has been* "so undermined . . . that it is no longer good law." *Ante,* at 217–218; see also *ante,* at 222–235. But nothing can disguise the reality that, until today, *Aguilar* had not been overruled. Good or bad, it was in fact the law.

Despite the problematic use of Rule 60(b), the Court "see[s] no reason to wait for a 'better vehicle.'" *Ante,* at 239. There are such vehicles in motion, and the Court does not say otherwise. See, *e. g., Committee for Public Ed. and Religious Liberty* v. *Secretary, U. S. Dept. of Ed.,* 942 F. Supp. 842 (EDNY 1996) *(PEARL II); Helms* v. *Cody,* 856 F. Supp. 1102 (ED La. 1994); cf. Brief for U. S. Secretary of Education 45 (noting that a school district other than New York City could bring an action against the Secretary to challenge an *Aguilar*-based Title I funding decision). The *Helms* case, which has been appealed to the Fifth Circuit, involves an Establishment Clause challenge to Louisiana's special education program. In *PEARL II,* the District Court upheld aspects of New York City's current Title I program that were challenged under the Establishment Clause. The plaintiffs filed a notice of appeal in that case, but the parties later stipulated to withdraw the appeal, without prejudice to reinstatement, pending our decision in this case.

See Stipulation of Withdrawal of Appeal in *Committee for Public Ed. and Religious Liberty* v. *Secretary, U. S. Dept. of Ed.*, No. 96–6329 (CA2) (filed Mar. 20, 1997).

Unlike the majority, I find just cause to await the arrival of *Helms, PEARL II,* or perhaps another case in which our review appropriately may be sought, before deciding whether *Aguilar* should remain the law of the land. That cause lies in the maintenance of integrity in the interpretation of procedural rules, preservation of the responsive, non-agenda-setting character of this Court, and avoidance of invitations to reconsider old cases based on "speculat[ions] on chances from changes in [the Court's membership]." *Illinois Central R. Co.*, 184 U. S., at 92.

IDAHO ET AL. *v.* COEUR D'ALENE TRIBE OF IDAHO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 94–1474. Argued October 16, 1996—Decided June 23, 1997

Alleging ownership in the submerged lands and bed of Lake Coeur d'Alene and various of its navigable tributaries and effluents lying within the original boundaries of the Coeur d'Alene Reservation (the submerged lands), the Coeur d'Alene Tribe and various of its members (collectively, the Tribe) filed this federal-court action against the State of Idaho, various state agencies, and numerous state officials in their individual capacities. The Tribe sought, *inter alia*, a declaratory judgment establishing its entitlement to the exclusive use and occupancy and the right to quiet enjoyment of the submerged lands, a declaration of the invalidity of all Idaho laws, customs, or usages purporting to regulate those lands, and a preliminary and permanent injunction prohibiting defendants from taking any action in violation of the Tribe's rights in the lands. The District Court dismissed the suit, but the Ninth Circuit affirmed in part, reversed in part, and remanded. As here relevant, the latter court agreed with the District Court that the Eleventh Amendment barred all claims against the State and its agencies, as well as the quiet title action against the officials. However, it found the doctrine of *Ex parte Young*, 209 U. S. 123, applicable and allowed the claims for declaratory and injunctive relief against the officials to proceed insofar as they sought to preclude continuing violations of federal law. The court reasoned that those claims are based on Idaho's ongoing interference with the Tribe's alleged ownership rights, and found it conceivable that the Tribe could prove facts entitling it to relief on the claims.

Held: The judgment is reversed in part, and the case is remanded.

42 F. 3d 1244, reversed in part and remanded.

JUSTICE KENNEDY delivered the opinion of the Court with respect to Parts I, II–A, and III, concluding that the Tribe's suit against the state officials may not proceed in federal court. Pp. 267–270, 281–288.

(a) Because States enjoy Eleventh Amendment immunity in suits by Indian tribes, *Blatchford* v. *Native Village of Noatak*, 501 U. S. 775, 782, the present suit is barred unless it falls within the exception this Court has recognized for certain suits seeking declaratory and injunctive relief against state officers in their individual capacities, see, *e. g.*, *Ex parte*

Young, supra. The Court does not question the continuing validity of the *Young* doctrine, but acknowledges that questions will arise as to its proper scope and application. In resolving these questions, the Court must ensure that the sovereign immunity doctrine remains meaningful, while also giving recognition to the need to prevent violations of federal law. In a suit commenced against such officials, even if they are named and served as individuals, the State itself will have a continuing interest in the litigation whenever state policies or procedures are at stake. See, *e. g., Pennhurst State School and Hospital* v. *Halderman,* 465 U. S. 89, 114, n. 25. Pp. 267–270.

(b) The Tribe may not avoid the Eleventh Amendment bar and avail itself of the *Young* exception in this action. In support of *Young's* applicability, the Tribe alleges an ongoing violation of its property rights under federal law, seeks prospective injunctive relief, and attempts to rely on the plurality decision in *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U. S. 670. The latter case is not helpful because the state officials there were acting beyond their state-conferred authority, *id.*, at 696–697, a theory the Tribe does not even attempt to pursue in this case. Moreover, although a request for prospective relief from an allegedly ongoing federal-law violation is ordinarily sufficient to invoke the *Young* fiction, this case is unusual in that the Tribe's suit is the functional equivalent of a quiet title action implicating special sovereignty interests. This is especially troubling when coupled with the far-reaching and invasive relief the Tribe seeks, which would shift substantially all benefits of ownership and control of vast areas from the State to the Tribe, and thereby entail consequences going well beyond those typically present in a real property quiet title action. Furthermore, the requested relief would divest the State of its control over lands underlying navigable waters, which have historically been considered uniquely "sovereign lands," see, *e. g., Utah Div. of State Lands* v. *United States,* 482 U. S. 193, 195–198, title to which is conferred on the States by the Constitution itself, see *Oregon ex rel. State Land Bd.* v. *Corvallis Sand & Gravel Co.*, 429 U. S. 363, 374. Indeed, Idaho law views its interest in the submerged lands in such terms. Under these particular and special circumstances, the *Young* exception is inapplicable. The dignity and status of its statehood allows Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case. Pp. 281–288.

KENNEDY, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, and III, in which REHN-

QUIST, C. J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined, and an opinion with respect to Parts II–B, II–C, and II–D, in which REHNQUIST, C. J., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, in which SCALIA and THOMAS, JJ., joined, *post*, p. 288. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined, *post*, p. 297.

Clive J. Strong, Deputy Attorney General of Idaho, argued the cause for petitioners. With him on the briefs were *Alan G. Lance*, Attorney General, and *Steven W. Strack*, Deputy Attorney General.

Raymond C. Givens argued the cause for respondents. With him on the brief were *David J. Bederman* and *Shannon D. Work*.*

JUSTICE KENNEDY announced the judgment of the Court and delivered the opinion of the Court with respect to Parts

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**Richard Ruda* and *James I. Crowley* filed a brief for the Council of State Governments et al. as *amici curiae* urging reversal.

Briefs of *amicus curiae* urging affirmance were filed for the United States by *Acting Solicitor General Dellinger, Assistant Attorney General Schiffer, Deputy Solicitor General Kneedler, Jeffrey P. Minear, Anne S. Almy*, and *Edward J. Shawaker;* and for the American Civil Liberties Union by *Robin L. Dahlberg* and *Steven R. Shapiro.*

Briefs of *amici curiae* were filed for the State of California et al. by *Daniel E. Lungren*, Attorney General of California, *Roderick E. Walston*, Chief Assistant Attorney General, and *Jan S. Stevens*, Assistant Attorney General, joined by the Attorneys General for their respective States as follows: *Jeff Sessions* of Alabama, *Bruce M. Botelho* of Alaska, *Grant Woods* of Arizona, *Winston Bryant* of Arkansas, *Gale A. Norton* of Colorado, *Richard Blumenthal* of Connecticut, *Robert A. Butterworth* of Florida, *Margery S. Bronster* of Hawaii, *Thomas J. Miller* of Iowa, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Jeremiah W. Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Dennis C. Vacco* of New York, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Mark Barnett* of South Dakota, *Jan Graham* of Utah, *Christine O. Gregoire* of Washington, and *James E. Doyle* of Wisconsin; and for the Stockbridge-Munsee Indian Community by *Richard Dauphinais.*

I, II–A, and III, and an opinion with respect to Parts II–B, II–C, and II–D, in which THE CHIEF JUSTICE joins.

In the northern region of Idaho, close by the Coeur d'Alene Mountains which are part of Bitterroot Range, lies tranquil Lake Coeur d'Alene. One of the Nation's most beautiful lakes, it is some 24 miles long and 1 to 3 miles wide. The Spokane River originates here and thence flows west, while the lake in turn is fed by other rivers and streams, including Coeur d'Alene River which flows to it from the east, as does the forested Saint Joe River which begins high in the Bitterroots and gathers their waters along its 130-mile journey. To the south of the lake lies the more populated part of the Coeur d'Alene Reservation. Whether the Coeur d'Alene Tribe's ownership extends to the banks and submerged lands of the lake and various of these rivers and streams, or instead ownership is vested in the State of Idaho, is the underlying dispute. We are limited here, however, to the important, preliminary question whether the Eleventh Amendment bars a federal court from hearing the Tribe's claim.

I

Alleging ownership in the submerged lands and bed of Lake Coeur d'Alene and of the various navigable rivers and streams that form part of its water system, the Coeur d'Alene Tribe, a federally recognized Tribe, together with various individual Tribe members, sued in federal court. As there is no relevant distinction between the Tribe and those of its members who have joined the suit, for purposes of the issue we decide, we refer to them all as the Tribe. The Coeur d'Alene Reservation consists of some 13,032 acres of tribal land, 55,583 acres of allotted land, and 330 Government owned acres. Statistical Record of Native North Americans 53 (M. Raddy ed. 1995). The Tribe claimed the beneficial interest, subject to the trusteeship of the United States, in the beds and banks of all navigable watercourses and waters (the "submerged lands") within the original boundaries of the Coeur d'Alene Reservation, as defined by Executive Order on November 8, 1873. Exec. Order of Nov. 8, 1873, reprinted in 1 C. Kappler, Indian Affairs: Laws and Treaties 837 (1904). The area in dispute includes the banks and beds and submerged lands of Lake Coeur d'Alene and some portions of the various rivers and streams we have described. In the alternative, the Tribe claimed ownership of the submerged lands pursuant to unextinguished aboriginal title. A state forum was available, see Idaho Code §5–328 (1990), but the Tribe brought this action in the United States District Court for the District of Idaho.

The suit named the State of Idaho, various state agencies, and numerous state officials in their individual capacities. In addition to its title claims, the Tribe further sought a declaratory judgment to establish its entitlement to the exclusive use and occupancy and the right to quiet enjoyment of the submerged lands as well as a declaration of the invalidity of all Idaho statutes, ordinances, regulations, customs, or usages which purport to regulate, authorize, use, or affect in any way the submerged lands. Finally, it sought a preliminary and permanent injunction prohibiting defendants from regulating, permitting, or taking any action in violation of the Tribe's rights of exclusive use and occupancy, quiet enjoyment, and other ownership interest in the submerged lands along with an award for costs and attorney's fees and such other relief as the court deemed appropriate.

The defendants moved to dismiss the Tribe's complaint on Eleventh Amendment immunity grounds and for failure to state a claim upon which relief could be granted. The court held the Eleventh Amendment barred the claims against Idaho and the agencies. It concluded further that the action against the officials for quiet title and declaratory relief was barred by the Eleventh Amendment because these claims were the functional equivalents of a damages award against the State. It dismissed the claim for injunctive relief against the officials, on the merits, since Idaho was in rightful possession of the submerged lands as a matter of law. It explained that Idaho acquired ownership of the submerged lands upon its statehood in 1890 under the equal footing doctrine. The court did not discuss the Tribe's claim to aboriginal title. 798 F. Supp. 1443 (1992).

The Ninth Circuit affirmed in part, reversed in part, and remanded. 42 F. 3d 1244 (1994). It agreed with the District Court that the Eleventh Amendment barred all claims against the State and its agencies, as well as the quiet title action against the officials. The Court of Appeals found the *Ex parte Young*, 209 U. S. 123 (1908), doctrine applicable and allowed the claims for declaratory and injunctive relief against the officials to proceed insofar as they sought to preclude continuing violations of federal law. The requested declaratory and injunctive relief, the Court of Appeals reasoned, is based upon Idaho's ongoing interference with the Tribe's alleged ownership rights premised on the 1873 Executive Order as later ratified by federal statute. See Act of Mar. 3, 1891, ch. 543, § 19, 26 Stat. 1026–1029. It further found it conceivable that the Tribe could prove facts entitling it to relief. It reversed the District Court's dismissal of the declaratory and injunctive relief claims and ordered the case remanded. It also remanded for consideration of the Tribe's claim for declaratory relief based on aboriginal title. We granted certiorari, 517 U. S. 1132 (1996), to consider whether the suit for declaratory and injunctive relief based on the Tribe's purported beneficial interest in title may proceed, and we now reverse in part.

After issuance of the District Court's opinion the United States filed suit against the State of Idaho on behalf of the Tribe seeking to quiet title to approximately a third of the land covered by this suit. *United States* v. *Idaho*, No. 94–0328 (D. Idaho, filed July 21, 1994). The Government's separate suit is still pending and is not implicated here.

II

A

The grant of federal judicial power is cast in terms of its reach or extent. Article III, §2, of the Constitution provides the "judicial Power shall extend" to the cases it enumerates, including "all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States." The Eleventh Amendment, too, employs the term "extend." It provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

This point of commonality could suggest that the Eleventh Amendment, like the grant of Article III, §2, jurisdiction, is cast in terms of reach or competence, so the federal courts are altogether disqualified from hearing certain suits brought against a State. This interpretation, however, has been neither our tradition nor the accepted construction of the Amendment's text. Rather, a State can waive its Eleventh Amendment protection and allow a federal court to hear and decide a case commenced or prosecuted against it. The Amendment, in other words, enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary's subject-matter jurisdiction. The immunity is one the States enjoy save where there has been " 'a surrender of this immunity in the plan of the convention.' " *Principality of Monaco* v. *Mississippi*, 292 U. S. 313, 322–323 (1934) (quoting The Federalist No. 81).

The Court's recognition of sovereign immunity has not been limited to the suits described in the text of the Eleventh Amendment. To respect the broader concept of immunity, implicit in the Constitution, which we have regarded the Eleventh Amendment as evidencing and exemplifying, we have extended a State's protection from suit to suits brought by the State's own citizens. *Hans* v. *Louisiana,* 134 U. S. 1 (1890). Furthermore, the dignity and respect afforded a State, which the immunity is designed to protect, are placed in jeopardy whether or not the suit is based on diversity jurisdiction. As a consequence, suits invoking the federal-question jurisdiction of Article III courts may also be barred by the Amendment. *Seminole Tribe of Fla.* v. *Florida,* 517 U. S. 44 (1996).

In extended criticisms of the Court's recognition that the immunity can extend to suits brought by a State's own citizens and to suits premised on federal questions, some of them as recent as last Term, see *id.,* at 83–93 (STEVENS, J., dissenting); *id.,* at 109–110 (SOUTER, J., dissenting), various dissenting and concurring opinions have urged a change in direction. See, *e. g., Atascadero State Hospital* v. *Scanlon,* 473 U. S. 234, 247 (1985) (Brennan, J., dissenting). Were we to abandon our understanding of the Eleventh Amendment as reflecting a broader principle of sovereign immunity, the Tribe's suit, which is based on its purported federal property rights, might proceed. These criticisms and proposed doctrinal revisions, however, have not found acceptance with a majority of the Court. We adhere to our precedent.

Under well-established principles, the Coeur d'Alene Tribe, and, *a fortiori,* its members, are subject to the Eleventh Amendment. In *Blatchford* v. *Native Village of Noatak,* 501 U. S. 775, 779–782 (1991), we rejected the contention that sovereign immunity only restricts suits by individuals against sovereigns, not by sovereigns against sovereigns. Since the plan of the Convention did not surrender Indian tribes' immunity for the benefit of the States, we reasoned that the States likewise did not surrender their immunity for the benefit of the tribes. Indian tribes, we therefore concluded, should be accorded the same status as foreign sovereigns, against whom States enjoy Eleventh Amendment immunity. *Id.*, at 782.

The Tribe's suit, accordingly, is barred by Idaho's Eleventh Amendment immunity unless it falls within the exception this Court has recognized for certain suits seeking declaratory and injunctive relief against state officers in their individual capacities. See *Ex parte Young,* 209 U. S. 123 (1908). The *Young* exception to sovereign immunity was an important part of our jurisprudence when the Court adhered to its precedents in the face of the criticisms we have mentioned, and when the Court, overruling *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1 (1989), held that Congress, in the exercise of its power to regulate commerce with Indian tribes, may not abrogate state sovereign immunity. *Seminole Tribe, supra,* at 71, n. 14. We do not, then, question the continuing validity of the *Ex parte Young* doctrine. Of course, questions will arise as to its proper scope and application. In resolving these questions we must ensure that the doctrine of sovereign immunity remains meaningful, while also giving recognition to the need to prevent violations of federal law.

When suit is commenced against state officials, even if they are named and served as individuals, the State itself will have a continuing interest in the litigation whenever state policies or procedures are at stake. This commonsense observation of the State's real interest when its officers are named as individuals has not escaped notice or comment from this Court, either before or after *Young.* See, *e. g., Osborn* v. *Bank of United States,* 9 Wheat. 738, 846–847 (1824) (stating that the State's interest in the suit was so "direct" that "perhaps no decree ought to have been pronounced in the cause, until the State was before the court") (Marshall, C. J.); *Pennhurst State School and Hospital* v. *Halderman,* 465 U. S. 89, 114, n. 25 (1984) (noting that *Young* rests on a fictional distinction between the official and the State); see also *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458

U. S. 670, 685 (1982) (opinion of STEVENS, J.) (recognizing the irony that a state official's conduct may be considered "'state action'" for Fourteenth Amendment purposes yet not for purposes of the Eleventh Amendment). Indeed, the suit in *Young,* which sought to enjoin the state attorney general from enforcing state law, implicated substantial state interests. 209 U. S., at 174 ("[T]he manifest, indeed the avowed and admitted, object of seeking [the requested] relief [is] *to tie the hands* of the *State*") (Harlan, J., dissenting). We agree with these observations.

To interpret *Young* to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle, reaffirmed just last Term in *Seminole Tribe,* that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction. The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading. Application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction. See, *e. g., Pennhurst, supra,* at 102–103, 114, n. 25 (explaining that the limitation in *Edelman* v. *Jordan,* 415 U. S. 651 (1974), of *Young* to prospective relief represented a refusal to apply the fiction in every conceivable circumstance).

B

Putting aside the acts of state officials which are plainly ultra vires under state law itself, see *Pennhurst, supra,* at 101–102, n. 11, there are, in general, two instances where *Young* has been applied. The first is where there is no state forum available to vindicate federal interests, thereby placing upon Article III courts the special obligation to ensure the supremacy of federal statutory and constitutional law. This is a most important application of the *Ex parte Young* doctrine and is exemplified by the facts in *Young* itself. See 209 U. S., at 146 ("The necessary effect and result of [the challenged] legislation must be to preclude a resort to the courts (either state or Federal) for the purpose of testing its validity").

As is well known, the ultimate question in *Young* was whether the State's attorney general could enforce a state ratesetting scheme said by the objecting shareholders of railroad companies to be unconstitutional. The shareholders sought a federal injunction against Attorney General Young, prohibiting enforcement of the rate scheme. Attempting to show the lack of necessity for federal intervention, Young maintained the shareholders could wait until a state enforcement proceeding was brought against the railroads and then test the law's validity by raising constitutional defenses. The Court rejected the argument, first because a single violation might not bring a prompt prosecution; and second because the penalties for violations were so severe a railroad official could not test the law without grave risk of heavy fines and imprisonment. The Court added that a federal suit for injunctive relief would be "undoubtedly the most convenient, the most comprehensive and the most orderly way in which the rights of all parties can be properly, fairly and adequately passed upon." *Id.*, at 166.

Where there is no available state forum the *Young* rule has special significance. In that instance providing a federal forum for a justiciable controversy is a specific application of the principle that the plan of the Convention contemplates a regime in which federal guarantees are enforceable so long as there is a justiciable controversy. The Federalist No. 80, p. 475 (C. Rossiter ed. 1961) (A. Hamilton) ("[T]here ought always to be a constitutional method of giving efficacy to constitutional provisions"). We, of course, express no opinion as to the circumstances in which the unavailability of injunctive relief in state court would raise constitutional concerns under current doctrine.

Young was not an isolated example of an instance where a state forum was unavailable. See, *e. g., Osborn, supra,* at 842–843 (explaining that if it was within the power of the plaintiff to make the State a party to the suit it would "certainly [be] true" that a suit against state officials would be barred, but if the "real principal" is "exempt from all judicial process" an officer suit could proceed); *United States* v. *Lee,* 106 U. S. 196 (1882) (permitting suit for injunctive relief to proceed where there did not otherwise exist a legal remedy for the alleged trespass); *Poindexter* v. *Greenhow,* 114 U. S. 270, 299 (1885) (explaining that the state-law remedy for Virginia's unconstitutional refusal to accept its own bond coupons in satisfaction of state taxes was, in fact, "no remedy"). In these early cases, the Court, although expressing concern over the lack of a forum, did not rely on the lack of a forum as its doctrinal basis. After abandonment of *Osborn*'s rule that a suit was not against the State so long as the State was not a party of record, see *Governor of Georgia* v. *Madrazo,* 1 Pet. 110, 124 (1828), the *Young* fiction was employed where "the act complained of, considered apart from the official authority alleged as its justification, and as the personal act of the individual defendant, constituted a violation of right for which the plaintiff was entitled to a remedy at law or in equity against the wrongdoer in his individual character." *In re Ayers,* 123 U. S. 443, 502 (1887). In other words, where the individual would have been liable at common law for his actions, sovereign immunity was no bar regardless of the person's official position. See, *e. g., Lee, supra,* at 221 (common-law tort of trespass); *Belknap* v. *Schild,* 161 U. S. 10, 18 (1896) (common-law tort of patent infringement); *Tindal* v. *Wesley,* 167 U. S. 204, 221–222 (1897) (common-law tort of trespass); *Scully* v. *Bird,* 209 U. S. 481, 483 (1908) (common-law tort of injuring plaintiff's reputation and sale of certain products). Under this line of reasoning, a state official who committed a common-law tort was said to have been "stripped" of his official or representative character. See *Young, supra,* at 159–160; *Poindexter, supra,* at 288.

With the growth of statutory and complex regulatory schemes, this mode of analysis might have been somewhat obscured. Part of the significance of *Young,* in this respect, lies in its treatment of a threatened suit by an official to enforce an unconstitutional state law as if it were a common-law tort. See 209 U. S., at 158 (treating this possibility as a "specific wrong or trespass"); *id.,* at 167 ("The difference between an actual and direct interference with tangible property and the enjoining of state officers from enforcing an unconstitutional act, is not of a radical nature"). Treatment of a threatened suit to enforce an unconstitutional statute as a tort found support in *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362 (1894), and *Smyth* v. *Ames,* 169 U. S. 466 (1898). See Currie, Sovereign Immunity and Suits Against Government Officers, 1984 S. Ct. Rev. 149, 154, and n. 35. By employing the common-law injury framework, the *Young* Court underscored the inadequacy of state procedures for vindicating the constitutional rights at stake. 209 U. S., at 163–166. The enforcement scheme in *Young,* which raised obstacles to the vindication of constitutional claims, was not unusual. See, *e. g., Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19, 53–54 (1909) (discussing the "enormous and overwhelming" penalties for violating the challenged statutes); *Western Union Telegraph Co.* v. *Andrews,* 216 U. S. 165 (1910) (penalties for each violation of the challenged statute included $1,000 fine); *Herndon* v. *Chicago, R. I. & P. R. Co.,* 218 U. S. 135, 151 (1910) (penalties for violating the challenged statute could "in a short time . . . amount to many thousands of dollars"); *Oklahoma Operating Co.* v. *Love,* 252 U. S. 331, 336 (1920) (penalties for violations are "such as might well deter even the boldest and most confident"). In many situations, as in the above-cited cases, the exercise of a federal court's equitable jurisdiction was necessary to avoid "excessive and oppressive penalties, [the] possibility of [a] multiplicity of suits causing irreparable damage, or [the] lack of proper opportunities for [state] review." Warren, Federal and State Court Interference, 43 Harv. L. Rev. 345, 377–378 (1930).

The reluctance to place much reliance on the availability of a state forum can be understood in part by the prevalence of the idea that if a State consented to suit in a state forum it had consented, by that same act, to suit in a federal forum. See, *e. g.*, *Davis* v. *Gray*, 16 Wall. 203, 221 (1873); *Reagan* v. *Farmers' Loan & Trust Co.*, *supra*, at 391. Today, by contrast, it is acknowledged that States have real and vital interests in preferring their own forums in suits brought against them, interests that ought not to be disregarded based upon a waiver presumed in law and contrary to fact. See, *e. g.*, *Edelman* v. *Jordan*, 415 U. S., at 673. In this case, there is neither warrant nor necessity to adopt the *Young* device to provide an adequate judicial forum for resolving the dispute between the Tribe and the State. Idaho's courts are open to hear the case, and the State neither has nor claims immunity from their process or their binding judgment.

C

Even if there is a prompt and effective remedy in a state forum, a second instance in which *Young* may serve an important interest is when the case calls for the interpretation of federal law. This reasoning, which is described as the interest in having federal rights vindicated in federal courts, can lead to expansive application of the *Young* exception. See, *e. g.*, *Green* v. *Mansour*, 474 U. S. 64, 68 (1985) (explaining that *Young* furthers the federal interest in vindicating federal law); *Pennhurst*, 465 U. S., at 105 ("[T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights" (citation omitted)). It is difficult to say States consented to these types of suits in the plan of the Convention. Neither in theory nor in practice has it been shown problematic to have federal claims resolved in state courts where Eleventh Amendment immunity would be applicable in federal court but for an exception based on *Young*. For purposes of the Supremacy Clause, it is simply irrelevant whether the claim is brought in state or federal court. Federal courts, after all, did not have general federal-question jurisdiction until 1875. Assuming the availability of a state forum with the authority and procedures adequate for the effective vindication of federal law, due process concerns would not be implicated by having state tribunals resolve federal-question cases.

In some cases, it is true, the federal courts play an indispensable role in maintaining the structural integrity of the constitutional design. A federal forum assures the peaceful resolution of disputes between the States, *South Dakota* v. *North Carolina*, 192 U. S. 286 (1904), and suits initiated by the United States against States, *United States* v. *Texas*, 143 U. S. 621 (1892). While we can assume there is a special role for Article III courts in the interpretation and application of federal law in other instances as well, we do not for that reason conclude that state courts are a less than adequate forum for resolving federal questions. A doctrine based on the inherent inadequacy of state forums would run counter to basic principles of federalism. In *Stone* v. *Powell*, 428 U. S. 465 (1976), we expressed our "emphatic reaffirmation . . . of the constitutional obligation of the state courts to uphold federal law, and [our] expression of confidence in their ability to do so." *Allen* v. *McCurry*, 449 U. S. 90, 105 (1980).

Interpretation of federal law is the proprietary concern of state, as well as federal, courts. It is the right and duty of the States, within their own judiciaries, to interpret and to follow the Constitution and all laws enacted pursuant to it, subject to a litigant's right of review in this Court in a proper case. The Constitution and laws of the United States are not a body of law external to the States, acknowledged and enforced simply as a matter of comity. The Constitution is the basic law of the Nation, a law to which a State's ties are no less intimate than those of the National Government itself. The separate States and the Government of the United States are bound in the common cause of preserving the whole constitutional order. Federal and state law "together form one system of jurisprudence." *Claflin* v. *Houseman*, 93 U. S. 130, 137 (1876). It would be error coupled with irony were we to bypass the Eleventh Amendment, which enacts a scheme solicitous of the States, on the sole rationale that state courts are inadequate to enforce and interpret federal rights in every case.

It is a principal concern of the court system in any State to define and maintain a proper balance between the State's courts on one hand, and its officials and administrative agencies on the other. This is of vital concern to States. As the Idaho State Attorney General has explained: "Everywhere a citizen turns—to apply for a life-sustaining public benefit, to obtain a license, to respond to a complaint—it is [administrative law] that governs the way in which their contact with state government will be carried out." EchoHawk, Introduction to Administrative Procedure Act Issue, 30 Idaho L. Rev. 261 (1994). In the States there is an ongoing process by which state courts and state agencies work to elaborate an administrative law designed to reflect the State's own rules and traditions concerning the respective scope of judicial review and administrative discretion. An important case such as the instant one has features which instruct and enrich the elaboration of administrative law that is one of the primary responsibilities of the state judiciary. Where, as here, the parties invoke federal principles to challenge state administrative action, the courts of the State have a strong interest in integrating those sources of law within their own system for the proper judicial control of state officials.

Our precedents do teach us, nevertheless, that where prospective relief is sought against individual state officers in a federal forum based on a federal right, the Eleventh Amendment, in most cases, is not a bar. See, *e. g., Willcox,* 212 U. S., at 40. Indeed, since *Edelman* we have consistently allowed suits seeking prospective injunctive relief based on federal violations to proceed. Last Term, however, we did not allow a suit raising a federal question to proceed based on Congress' provision of an alternative review mechanism. Whether the presumption in favor of federal-court jurisdiction in this type of case is controlling will depend upon the particular context. What is really at stake where a state forum is available is the desire of the litigant to choose a particular forum versus the desire of the State to have the dispute resolved in its own courts. The Eleventh Amendment's background principles of federalism and comity need not be ignored in resolving these conflicting preferences. The *Young* exception may not be applicable if the suit would "upset the balance of federal and state interests that it embodies." *Papasan* v. *Allain,* 478 U. S. 265, 277 (1986). The exception has been "tailored to conform as precisely as possible to those specific situations in which it is necessary to permit the federal courts to vindicate federal rights." *Ibid.* (citation and internal quotation marks omitted); see also *Pennhurst,* 465 U. S., at 104, n. 13.

The course of our case law indicates the wisdom and necessity of considering, when determining the applicability of the Eleventh Amendment, the real affront to a State of allowing a suit to proceed. As we explained in *Ford Motor Co.* v. *Department of Treasury of Ind.,* 323 U. S. 459 (1945): "[T]he nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding." *Id.,* at 464. We held that "when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Ibid. In re Ayers,* cited with approval in *Young,* stated that it is not "conclusive of the principal question in this case, that the [State] is not named as a party defendant. Whether it is the actual party, in the sense of the prohibition of the Constitution, must be determined by a consideration of the nature of the case as presented on the whole record." 123 U. S., at 492. See also *Ex parte New York*, 256 U. S. 490, 500 (1921) (*Young*'s applicability "is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record"). Of course, the State's interests are almost always implicated to a certain extent in *Young* actions, but the statements we cite reflect the Court's recognition "that the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States." *Pennhurst, supra*, at 105.

D

Our recent cases illustrate a careful balancing and accommodation of state interests when determining whether the *Young* exception applies in a given case. In *Edelman* v. *Jordan*, 415 U. S. 651 (1974), the relief granted by the Federal District Court required state officials to release and remit federal benefits. While the District Court's order might have served the goal of deterrence as well as compensation, we concluded the suit was barred by the Eleventh Amendment because it was not necessary for the vindication of federal rights. In reaching this conclusion, we explained that "we must judge the award actually made in this case, and not one which might have been differently tailored in a different case." *Id.*, at 665. There was no need for the *Edelman* Court to consider the other relief granted by the District Court, prospectively enjoining state officials from failing to abide by federal requirements, since it was conceded that *Young* was sufficient for this purpose. 415 U. S., at 664. The second time the *Edelman* litigation came before the Court, in *Quern* v. *Jordan*, 440 U. S. 332 (1979), we made a point of saying the relief sought pursuant to the *Young* action was a notice "simply inform[ing] class members that their federal suit is at an end, that the federal court can provide them with no further relief, and that there are existing state administrative procedures . . . . Petitioner raises no objection to the expense of preparing or sending it. The class members are given no more . . . than what they would have gathered by sitting in the courtroom." 440 U. S., at 349 (citation and internal quotation marks omitted).

Milliken v. *Bradley*, 433 U. S. 267 (1977), is consistent with this approach. Although authorizing relief having an undeniably substantial effect on the State, *Milliken* does not obviate the need for careful consideration of a suit's impact. *Milliken* concerned a *Young* suit against various Michigan officials resulting in a District Court order requiring the State, along with the Detroit School Board, to pay for a comprehensive education program for schoolchildren who had been subjected to past acts of *de jure* segregation. The gravamen of the complaint and its ultimate purpose was to vindicate the plaintiffs' civil liberties, not to establish ownership over state resources or funds. The *Milliken* lawsuit and the resulting order were a direct result of the State's "official acts of racial discrimination committed by both the Detroit School Board and the State of Michigan" in violation of the Fourteenth Amendment. 433 U. S., at 269. If Congress pursuant to its §5 remedial powers under the Fourteenth Amendment may abrogate sovereign immunity, even if the resulting legislation goes beyond what is constitutionally necessary, see, *e. g.*, *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976) (concluding that Title VII's authorization of federal-court jurisdiction to award money damages against a state government to individuals subjected to employment discrimination does not violate the Eleventh Amendment since Congress was exercising its §5 remedial powers), it follows that the substantive provisions of the Fourteenth Amendment themselves offer a powerful reason to provide a federal forum.

The *Milliken* Court, for similar reasons, rejected a Tenth Amendment challenge to the order. 433 U. S., at 291. In short, "[t]he theme that thus emerges from [our recent *Young* cases] . . . is one of balancing of state and federal interests." *Pennsylvania* v. *Union Gas Co.*, 491 U. S., at 27 (STEVENS, J., concurring).

This case-by-case approach to the *Young* doctrine has been evident from the start. Before *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U. S. 682 (1949) (a federal sovereign immunity case), we allowed suits to proceed, as explained above, if the official committed a tort as defined by the common law. While *Larson* rejected this reliance on the common law of torts, see *id.*, at 692–695, the importance of case-by-case analysis was recognized again in *Seminole Tribe.* There, in holding the *Young* exception inapplicable to a suit based on federal law, we relied on *Schweiker* v. *Chilicky,* 487 U. S. 412 (1988). *Chilicky,* in turn, addressed whether a *Bivens* type of action, a right of action stemming from the Constitution itself, see *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388 (1971), applied in a suit alleging due process violations in the denial of Social Security disability benefits. A *Bivens* action was unavailable, the *Chilicky* Court held, given the particular circumstances present in the case. *Seminole Tribe*'s implicit analogy of *Young* to *Bivens* is instructive. Both the *Young* and *Bivens* lines of cases reflect a sensitivity to varying contexts, and courts should consider whether there are "special factors counselling hesitation," 403 U. S., at 396, before allowing a suit to proceed under either theory. The range of concerns to be considered in answering this inquiry is broad. See *id.*, at 407 (Harlan, J., concurring).

As no one disputes, the *Young* fiction is an exercise in line-drawing. There is no reason why the line cannot be drawn to reflect the real interests of States consistent with the clarity and certainty appropriate to the Eleventh Amendment's jurisdictional inquiry.

III

We now turn to consider whether the Tribe may avoid the Eleventh Amendment bar and avail itself of the *Young* exception. Although the "difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night," *Edelman,* 415 U. S., at 667, this suit, we decide, falls on the Eleventh Amendment side of the line, and Idaho's sovereign immunity controls.

The Tribe has alleged an ongoing violation of its property rights in contravention of federal law and seeks prospective injunctive relief. The Tribe argues that it should therefore be able to avail itself of the *Ex parte Young* fiction. Moreover, the Tribe points to the plurality decision in *Florida Dept. of State* v. *Treasure Salvors, Inc.,* 458 U. S. 670 (1982) (opinion of STEVENS, J.), where we allowed a Federal District Court to issue a warrant commanding state officials to turn over various artifacts (mainly treasure from a sunken Spanish galleon) to the United States Marshal despite the State's claim of sovereign immunity.

An allegation of an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction. However, this case is unusual in that the Tribe's suit is the functional equivalent of a quiet title action which implicates special sovereignty interests. We do not think *Treasure Salvors, supra,* is helpful to the Tribe because the state officials there were acting beyond the authority conferred upon them by the State, *id.,* at 696–697, a theory the Tribe does not even attempt to pursue in the case before us. We must examine the effect of the Tribe's suit and its impact on these special sovereignty interests in order to decide whether the *Ex parte Young* fiction is applicable.

It is common ground between the parties, at this stage of the litigation, that the Tribe could not maintain a quiet title suit against Idaho in federal court, absent the State's consent. The Eleventh Amendment would bar it. *Tindal,* 167 U. S., at 223. Despite this prohibition, the declaratory and injunctive relief the Tribe seeks is close to the functional equivalent of quiet title in that substantially all benefits of ownership and control would shift from the State to the Tribe. This is especially troubling when coupled with the far-reaching and invasive relief the Tribe seeks, relief with consequences going well beyond the typical stakes in a real property quiet title action. The suit seeks, in effect, a determination that the lands in question are not even within the regulatory jurisdiction of the State. The requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters. The suit would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory. To pass this off as a judgment causing little or no offense to Idaho's sovereign authority and its standing in the Union would be to ignore the realities of the relief the Tribe demands.

Any contention that the State is not implicated by the suit in a manner having an immediate effect on jurisdictional control over important public lands is belied by the complaint itself. The state officials who are the named defendants, all members of the Board of Land Commissioners save Director Higginson, include: Governor Cecil Andrus, who is Chairman of the Board and trustee of a public water right in Lake Coeur d'Alene pursuant to Idaho Code § 67–4304 (1989); Pete Cenarrusa, Secretary of State; Larry EchoHawk, Attorney General; Jerry Evans, Superintendent of Public Instruction; J. D. Williams, Auditor; and Keith Higginson, Director of the Department of Water Resources. The power to regulate and control the use and disposition of public lands, including the beds of navigable lakes, rivers, and streams, is vested in the Board of Land Commissioners. Idaho Const., Art. IX,

§7 (Supp. 1996); Idaho Code §§58–101, 58–104(9) (1994 and Supp. 1996).

Not only would the relief block all attempts by these officials to exercise jurisdiction over a substantial portion of land but also would divest the State of its sovereign control over submerged lands, lands with a unique status in the law and infused with a public trust the State itself is bound to respect. As we stressed in *Utah Div. of State Lands* v. *United States,* 482 U. S. 193, 195–198 (1987), lands underlying navigable waters have historically been considered "sovereign lands." State ownership of them has been "considered an essential attribute of sovereignty." *Id.,* at 195. The Court from an early date has acknowledged that the people of each of the Thirteen Colonies at the time of independence "became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." *Martin* v. *Lessee of Waddell,* 16 Pet. 367, 410 (1842). Then, in *Lessee of Pollard* v. *Hagan,* 3 How. 212 (1845), the Court concluded that States entering the Union after 1789 did so on an "equal footing" with the original States and so have similar ownership over these "sovereign lands." *Id.,* at 228–229. In consequence of this rule, a State's title to these sovereign lands arises from the equal footing doctrine and is "conferred not by Congress but by the Constitution itself." *Oregon ex rel. State Land Bd.* v. *Corvallis Sand & Gravel Co.,* 429 U. S. 363, 374 (1977). The importance of these lands to state sovereignty explains our longstanding commitment to the principle that the United States is presumed to have held navigable waters in acquired territory for the ultimate benefit of future States and "that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *United States* v. *Holt State Bank,* 270 U. S. 49, 55 (1926).

The principle which underlies the equal footing doctrine and the strong presumption of state ownership is that navigable waters uniquely implicate sovereign interests. The principle arises from ancient doctrines. See, *e. g.,* Institutes of Justinian, Lib. II, Tit. I, §2 (T. Cooper transl. 2d ed. 1841) ("Rivers and ports are public; hence the right of fishing in a port, or in rivers are in common"). The special treatment of navigable waters in English law was recognized in Bracton's time. He stated that "[a]ll rivers and ports are public, so that the right to fish therein is common to all persons. The use of river banks, as of the river itself, is also public." 2 H. Bracton, De Legibus et Consuetudinibus Angliae 40 (S. Thorne transl. 1968). The Magna Carta provided that the Crown would remove "all fish-weirs . . . from the Thames and the Medway and throughout all England, except on the sea coast." M. Evans & R. Jack, Sources of English Legal and Constitutional History 53 (1984); see also *Waddell, supra,* at 410–413 (tracing tidelands trusteeship back to Magna Carta).

The Court in *Shively* v. *Bowlby,* 152 U. S. 1, 13 (1894), summarizing English common law, stated:

> "In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high water mark, is in the King; except so far as an individual or a corporation has acquired rights in it by express grant, or by prescription or usage . . . and that this title, *jus privatum,* whether in the King or in a subject, is held subject to the public right, *jus publicum,* of navigation and fishing."

Not surprisingly, American law adopted as its own much of the English law respecting navigable waters, including the principle that submerged lands are held for a public purpose.

See *Arnold* v. *Mundy,* 6 N. J. L. 1 (1821). A prominent example is *Illinois Central R. Co.* v. *Illinois,* 146 U. S. 387 (1892), where the Court held that the Illinois Legislature did not have the authority to vest the State's right and title to a portion of the navigable waters of Lake Michigan in a private party even though a proviso in the grant declared that it did not authorize obstructions to the harbor, impairment of the public right of navigation, or exemption of the private party from any act regulating rates of wharfage and dockage to be charged in the harbor. An attempted transfer was beyond the authority of the legislature since it amounted to abdication of its obligation to regulate, improve, and secure submerged lands for the benefit of every individual. *Id.,* at 455–460. While *Illinois Central* was "necessarily a statement of Illinois law," *Appleby* v. *City of New York,* 271 U. S. 364, 395 (1926), it invoked the principle in American law recognizing the weighty public interests in submerged lands.

American law, in some ways, enhanced and extended the public aspects of submerged lands. English law made a distinction between waterways subject to the ebb and flow of the tide and large enough to accommodate boats (royal rivers) and nontidal waterways (public highways). With respect to the royal rivers, the King was presumed to hold title to the riverbed and soil while the public retained the right of passage and the right to fish. With public highways, as the name suggests, the public retained the right of passage, but title was typically held by a private party. See J. Angell, A Treatise on The Common Law in relation to Water-Courses 14–18 (1824). The riparian proprietor was presumed to hold title to the stream to the center thread of the waters *(usque ad filum aquae),* which accorded him the exclusive right of fishery in the stream and entitled him to compensation for any impairment of his right to the enjoyment of his property caused by construction. The State's obligation to pay compensation could result in substantial liability. *Shrunk* v. *Schuylkill,* 14 Serg. & Rawle 71, 80 (Pa.

1826). State courts, however, early on in Pennsylvania, South Carolina, Alabama, and North Carolina rejected the distinction and concluded the State presumptively held title regardless of whether the waterway was subject to the ebb and flow of the tide. See, *e. g., Carson* v. *Blazer,* 2 Binn. 475 (Pa. 1810); *Cates* v. *Wadlington,* 1 McCord 580 (S. C. 1822); *Bullock* v. *Wilson,* 2 Port. 436 (Ala. 1835); *Collins* v. *Benbury,* 3 Iredell 277 (N. C. 1842); but see *Hooker* v. *Cummings,* 20 Johns. 90 (N. Y. 1822). And this Court in describing the concept of sovereign lands rejected the requirement that navigable waters need be affected by the tides. *Barney* v. *Keokuk,* 94 U. S. 324, 337–338 (1877); cf. *Propeller Genesee Chief* v. *Fitzhugh,* 12 How. 443 (1852).

American law, moreover, did not recognize the sovereign's rights of private property *(jus privatum)* that existed in England, apart from the public's rights to this land *(jus publicum).* In England, for instance, the Crown had the exclusive right to hunt the "grand fishes," *e. g.,* whales and sturgeons, of the sea. J. Angell, A Treatise on the Right of Property in Tide Waters and in the Soil and Shores Thereof 18–19 (1847). There was a particular aversion to recognizing in States the Crown's *jus privatum* right to seize private structures on shores and marshes reclaimed from tidewaters. See J. Gould, A Treatise on the Law of Waters including Riparian Rights, and Public And Private Rights In Waters Tidal And Inland § 32 (2d ed. 1891). All these developments in American law are a natural outgrowth of the perceived public character of submerged lands, a perception which underlies and informs the principle that these lands are tied in a unique way to sovereignty.

Idaho views its interest in the submerged lands in similar terms. Idaho law provides: "Water being essential to the industrial prosperity of the state, and all agricultural development . . . its control shall be in the state, which, in providing for its use, shall equally guard all the various interests involved. All the waters of the state, when flowing in their natural channels . . . are declared to be the property of the state." Idaho Code § 42–101 (1990). Title to these public waters is held by the State of Idaho in its sovereign capacity for the purpose of ensuring that it is used for the public benefit. *Poole* v. *Olaveson,* 82 Idaho 496, 503, 356 P. 2d 61, 65 (1960). There are specific statutory provisions concerning Lake Coeur d'Alene. The Lake is held in trust by the Governor for the people of the State of Idaho. The "preservation of [Lake Coeur d'Alene] for scenic beauty, health, recreation, transportation and commercial purposes [being] necessary and desirable for all the inhabitants of the state is hereby declared to be a beneficial use of such water." Idaho Code § 67–4304 (1989). The "lands belonging to the state of Idaho between the ordinary high and low water mark at [Lake Coeur d'Alene] . . . are hereby declared to be devoted to a public use in connection with the preservation of said lak[e] in [its] present condition as a health resort and recreation place for the inhabitants of the state." Idaho Code § 67–4305 (Supp. 1996).

Our recitation of the ties between the submerged lands and the State's own sovereignty, and of the severance and diminishment of state sovereignty were the declaratory and injunctive relief to be granted, is not in derogation of the Tribe's own claim. As the Tribe views the case, the lands are just as necessary, perhaps even more so, to its own dignity and ancient right. The question before us is not the merit of either party's claim, however, but the relation between the sovereign lands at issue and the immunity the State asserts.

It is apparent, then, that if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury. Under these particular and special circumstances, we find the *Young* exception inapplicable. The dignity and status of its statehood allow Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case.

The judgment of the Court of Appeals is reversed in part, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE SCALIA and JUSTICE THOMAS join, concurring in part and concurring in the judgment.

The Coeur d'Alene Tribe of Idaho seeks declaratory and injunctive relief precluding Idaho officials from regulating or interfering with its possession of submerged lands beneath Lake Coeur d'Alene. Invoking the doctrine of *Ex parte Young*, 209 U. S. 123 (1908), the Tribe argues that the Eleventh Amendment does not bar it from pursuing its claims against state officials in federal court. I agree with the Court that the Tribe's claim cannot go forward in federal court.

In *Young*, the Court held that a federal court has jurisdiction over a suit against a state officer to enjoin official actions that violate federal law, even if the State itself is immune from suit under the Eleventh Amendment. The *Young* doctrine recognizes that if a state official violates federal law, he is stripped of his official or representative character and may be personally liable for his conduct; the State cannot cloak the officer in its sovereign immunity. *Id.*, at 159–160. Where a plaintiff seeks prospective relief to end a state officer's ongoing violation of federal law, such a claim can ordinarily proceed in federal court. *Milliken* v. *Bradley*, 433 U. S. 267, 289–290 (1977). The doctrine is not, however, without limitations. A federal court cannot award retrospective relief, designed to remedy past violations of federal law. See *Edelman* v. *Jordan*, 415 U. S. 651, 668 (1974); *Green* v. *Mansour*, 474 U. S. 64, 68–69 (1985).

This case is unlike a typical *Young* action in two important respects. First, as the Tribe concedes, the suit is the functional equivalent of an action to quiet its title to the bed of Lake Coeur d'Alene. It asks a federal court to declare that the lands are for the exclusive use, occupancy, and enjoyment of the Tribe and to invalidate all statutes and ordinances purporting to regulate the lands. The Tribe could not maintain a quiet title action in federal court without the State's consent, and for good reason: A federal court cannot summon a State before it in a private action seeking to divest the State of a property interest. *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U. S. 670, 699–700 (1982) (plurality opinion); see *Ford Motor Co.* v. *Department of Treasury of Ind.*, 323 U. S. 459, 464 (1945). Second, the Tribe does not merely seek to possess land that would otherwise remain subject to state regulation, or to bring the State's regulatory scheme into compliance with federal law. Rather, the Tribe seeks to eliminate altogether the State's regulatory power over the submerged lands at issue—to establish not only that the State has no right to possess the property, but also that the property is not within Idaho's sovereign jurisdiction at all. We have repeatedly emphasized the importance of submerged lands to state sovereignty. Control of such lands is critical to a State's ability to regulate use of its navigable waters. *Utah Div. of State Lands* v. *United States*, 482 U. S. 193, 195 (1987).

The Tribe's claim to federal jurisdiction rests heavily on cases that, in my view, do not control here. The first is *Treasure Salvors*, in which a plurality concluded that a federal court could issue a warrant commanding Florida officials to release certain artifacts because the suit was not, in effect, a suit against the State. But the fact that the suit was permitted to proceed in *Treasure Salvors* does not advance our inquiry. The plurality's conclusion that the suit was not against the State was based on its view that state officials lacked any colorable basis under *state* law for claiming rightful possession of the artifacts. 458 U. S., at 692–697. Put another way, the plurality in *Treasure Salvors* would have permitted the suit to proceed not because the plaintiff's claim of title arguably rested on federal law, see *post,* at 311 (SOUTER, J., dissenting), but because state officials were acting beyond the authority conferred on them by the State, quite apart from whether their conduct also violated federal law. Because the Tribe does not pursue such a theory, *Treasure Salvors* provides little guidance here. In addition, whether or not the Court's ultimate holding in *Treasure Salvors* that the suit should proceed remains sound on the theory that the plaintiff identified a federal law basis for its claim of title, see *post,* at 307, n. 9 (SOUTER, J., dissenting), the only reasoning *explicitly* offered by the *Treasure Salvors* plurality was narrowed by our subsequent decision in *Pennhurst State School and Hospital* v. *Halderman,* 465 U. S. 89, 106 (1984) (plaintiff cannot invoke *Young* doctrine based solely on alleged violation of state law); see 465 U. S., at 114, n. 25.

Second, the Tribe invokes a series of cases in which plaintiffs successfully pursued in federal court claims that federal and state officials wrongfully possessed certain real property. See, *e. g., United States* v. *Lee,* 106 U. S. 196 (1882); *Tindal* v. *Wesley,* 167 U. S. 204 (1897). In both *Lee* and *Tindal,* the Court made clear that the suits could proceed against the officials because no judgment would bind the State. It was possible, the Court found, to distinguish between *possession* of the property and *title* to the property. See *Lee, supra,* at 222; *Tindal, supra,* at 223–224. A court could find that the officials had no right to remain in possession, thus conveying all the incidents of ownership to the plaintiff, while not formally divesting the State of its title. As noted, however, this case does not concern ownership and possession of an ordinary parcel of real property. When state officials are found to have no right to possess a disputed parcel of land, the State nevertheless retains its authority to regulate uses of the land. Here, the Tribe seeks a declaration not only that the State does not own the bed of Lake Coeur d'Alene, but also that the lands are not within the State's sovereign jurisdiction. Whatever distinction can be drawn between possession and ownership of real property in other contexts, it is not possible to make such a distinction for submerged lands. For this reason, *Lee*, *Tindal*, and analogous cases do not control here. In my view, because a ruling in the Tribe's favor, in practical effect, would be indistinguishable from an order granting the Tribe title to submerged lands, the *Young* exception to the Eleventh Amendment's bar is not properly invoked here.

While I therefore agree that the Tribe's suit must be dismissed, I believe that the principal opinion is flawed in several respects. In concluding that the Tribe's suit cannot proceed, the principal opinion reasons that federal courts determining whether to exercise jurisdiction over any suit against a state officer must engage in a case-specific analysis of a number of concerns, including whether a state forum is available to hear the dispute, what particular federal right the suit implicates, and whether "special factors counse[l] hesitation" in the exercise of jurisdiction. *Ante*, at 274, 275, 278–280 (internal quotation marks omitted). This approach unnecessarily recharacterizes and narrows much of our *Young* jurisprudence. The parties have not briefed whether such a shift in the *Young* doctrine is warranted. In my view, it is not.

The principal opinion begins by examining this Court's early *Young* cases and concludes that the Court found the exercise of federal jurisdiction proper in those cases principally because no state forum was available to vindicate a plaintiff's claim that state officers were violating federal law. *Ante*, at 270–274. But the principal opinion cites not a single case in which the Court expressly relied on the absence of an available state forum as a rationale for applying *Young*. Instead, the principal opinion invokes language in the Court's opinions suggesting that the plaintiff could not secure an adequate remedy *at law* in a state forum. See *Young,* 209 U. S., at 163; *Osborn* v. *Bank of United States,* 9 Wheat. 738, 838–846 (1824); *Lee, supra,* at 213, 219. But the inadequacy of a legal remedy is a prerequisite for equitable relief in any case. That we pronounced state legal remedies inadequate before permitting the suit to proceed is unsurprising, and it is not a sufficient basis for the principal opinion's broad conclusion.

Not only do our early *Young* cases fail to rely on the absence of a state forum as a basis for jurisdiction, but we also permitted federal actions to proceed even though a state forum *was* open to hear the plaintiff's claims. In fact, *Young* itself relied on two such cases, *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362 (1894), and *Smyth* v. *Ames,* 169 U. S. 466 (1898). See 209 U. S., at 153–155. Both *Reagan* and *Smyth,* like *Young,* involved challenges to state enforcement of railroad rates. In each case, the Court permitted the federal suit to proceed in part because state statutes authorized state court challenges to those rates. As *Young* made clear, however, the fact that the States had waived immunity in their own courts was not the sole basis for permitting the federal suit to proceed. Discussing *Reagan,* the *Young* Court stated: "This court held that [language authorizing a suit in state court] permitted a suit in [federal court], but it also held that, *irrespective of that consent, the suit was not in effect a suit against the State* (although the Attorney General was enjoined), and therefore not prohibited under the [Eleventh] [A]mendment. . . . *Each of these grounds is effective and both are of equal force.*" 209 U. S., at 153 (emphasis added). Similarly, the *Young* Court emphasized that the decision in *Smyth* was not based solely on the state statute authorizing suit in state court; rather, it was based on the conclusion that the suit "was not a suit against a State." 209 U. S., at 154.

In any event, as the principal opinion ultimately concedes, in more recent cases *Young* has been applied "[e]ven if there is a prompt and effective remedy in a state forum." *Ante,* at 274. When a plaintiff seeks prospective relief to end an ongoing violation of federal rights, ordinarily the Eleventh Amendment poses no bar. *Milliken,* 433 U. S., at 289–290. Yet the principal opinion unnecessarily questions this basic principle of federal law, finding it "difficult to say States consented to these types of suits in the plan of the Convention. . . . For purposes of the Supremacy Clause, it is simply irrelevant whether the claim is brought in state or federal court." *Ante,* at 274–275. We have frequently acknowledged the importance of having federal courts open to enforce and interpret federal rights. See *Green* v. *Mansour,* 474 U. S., at 68 ("[T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law"); *Pennhurst,* 465 U. S., at 105 ("[T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States. . . . Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights" (citations and internal quotation marks omitted)). There is no need to call into question the importance of having federal courts interpret federal rights—particularly as a means of serving a federal interest in uniformity—to decide this case. Nor does acknowledging the interpretive function of federal courts suggest that state courts are inadequate to apply federal law.

In casting doubt upon the importance of having federal courts interpret federal law, the principal opinion lays the groundwork for its central conclusion: that a case-by-case balancing approach is appropriate where a plaintiff invokes the *Young* exception to the Eleventh Amendment's jurisdictional bar, even when a complaint clearly alleges a violation of federal law and clearly seeks prospective relief. The principal opinion characterizes our modern *Young* cases as fitting this case-by-case model. *Ante,* at 278–280. While it is true that the Court has decided a series of cases on the scope of the *Young* doctrine, these cases do not reflect the principal opinion's approach. Rather, they establish only that a *Young* suit is available where a plaintiff alleges an *ongoing* violation of *federal* law, and where the relief sought is *prospective* rather than *retrospective.* Compare *Milliken, supra,* at 289–290, with *Green, supra,* at 68 (Eleventh Amendment bars notice relief where plaintiffs alleged no ongoing violation of federal law); *Pennhurst, supra,* at 106 (Eleventh Amendment bars suit alleging violation of state rather than federal law); *Edelman,* 415 U. S., at 668 (Eleventh Amendment bars relief for past violation of federal law).

The principal opinion properly notes that the Court found some of the relief awarded by the lower court in *Edelman*—an order requiring state officials to release and remit federal benefits—barred by the Eleventh Amendment. *Ante,* at 278; see *Edelman, supra,* at 668. It then states that the Court did not consider the propriety of other relief awarded below—an injunction requiring state officials to abide by federal requirements—because the State conceded that such relief was proper under *Young. Ante,* at 278. The principal opinion appears to suggest that the Court could have found such relief improper in the absence of this concession. But surely the State conceded this point because the law was well established. Indeed, *Edelman* is consistently cited for the proposition that prospective injunctive relief is available in a *Young* suit. See, *e. g., Milliken, supra,* at 289. Similarly, by focusing on the Court's statement in *Quern* v. *Jordan,* 440 U. S. 332, 349 (1979), that the state officials did not object to preparing or sending notice of class members' possible remedies under state administrative procedures, *ante,* at 278–279, the principal opinion implies that the Court upheld the prospective relief granted there because the relief was not particularly invasive. But the question in *Quern* was whether the notice relief was more like the prospective relief allowed in typical *Young* suits, or more like the retrospective relief disallowed in *Edelman.* 440 U. S., at 347. The *Quern* Court permitted the relief to stand not because it was inconsequential, but because it was adjudged prospective. Finally, the principal opinion explains this Court's decision in *Milliken*—which upheld an order requiring a State to pay for a comprehensive education for children who had been subjected to segregation—by focusing on the fact that the federal interests implicated by the claim in that case were particularly strong. *Ante,* at 279–280. Again, however, the Court upheld the relief not because the complaint sought to vindicate civil liberties, but because the remedy was prospective rather than retrospective. 433 U. S., at 289. Our case law simply does not support the proposition that federal courts must evaluate the importance of the federal right at stake before permitting an officer's suit to proceed.

Nor can I agree with the principal opinion's attempt to import the inquiry employed in *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388 (1971), into our *Young* jurisprudence. *Ante,* at 280. In the *Bivens* context, where the issue is whether an implied remedy for money damages exists in a suit against a federal official for a constitutional violation, we have declined to recognize such a remedy where we have identified "special factors counselling hesitation." 403 U. S., at 396. In likening *Young* actions to *Bivens* actions, the principal opinion places great weight on a single citation in the Court's opinion last Term in *Seminole Tribe of Fla.* v. *Florida,* 517 U. S. 44 (1996). There, relying on *Schweiker* v. *Chilicky,* 487 U. S. 412, 423 (1988), we noted that where Congress has created a remedial scheme for the enforcement of a federal right, we may not supplement that scheme in a suit against a federal officer with a judicially created remedy. We reasoned that the same general principle should apply in *Young* cases. That is, where Congress prescribes a detailed remedial scheme for enforcement of a statutory right, a court should not lift the Eleventh Amendment bar to apply its "full remedial powers" in a suit against an officer in a manner inconsistent with the legislative scheme. 517 U. S., at 75. The single citation to a *Bivens* case in *Seminole Tribe* by no means establishes that a case-by-case balancing approach to the *Young* doctrine is appropriate or consistent with our jurisprudence.

In sum, the principal opinion replaces a straightforward inquiry into whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective with a vague balancing test that purports to account for a "broad" range of unspecified factors. *Ante,* at 280. In applying that approach here, the principal opinion relies on characteristics of this case that do not distinguish it from cases in which the *Young* doctrine is properly invoked, such as the fact that the complaint names numerous public officials and the fact that the State will have a continuing interest in litigation against its officials. *Ante,* at 269–270, 282–283. These factors cannot supply a basis for deciding this case. Every *Young* suit names public officials, and we have never doubted the importance of state interests in cases falling squarely within our past interpretations of the *Young* doctrine.

While I do not subscribe to the principal opinion's reformulation of the appropriate jurisdictional inquiry for all cases in which a plaintiff invokes the *Young* doctrine, I nevertheless agree that the Court reaches the correct conclusion here. The *Young* doctrine rests on the premise that a suit against a state official to enjoin an ongoing violation of federal law is not a suit against the State. Where a plaintiff seeks to divest the State of all regulatory power over submerged lands—in effect, to invoke a federal court's jurisdiction to quiet title to sovereign lands—it simply cannot be said that the suit is not a suit against the State. I would not narrow our *Young* doctrine, but I would not extend it to reach this case. Accordingly, I join Parts I, II–A, and III of the Court's opinion.

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

Congress has implemented the Constitution's grant of federal-question jurisdiction by authorizing federal courts to enforce rights arising under the Constitution and federal law. The federal courts have an obligation to exercise that jurisdiction, and in doing so have applied the doctrine of *Ex parte Young*, 209 U. S. 123 (1908), that in the absence of some congressional limitation a federal court may entertain an individual's suit to enjoin a state officer from official action that violates federal law. The Coeur d'Alene Tribe of Idaho claims that officers of the State of Idaho are acting to regulate land that belongs to the Tribe under federal law, and the Tribe prays for declaratory and injunctive relief to halt the regulation as an ongoing violation of that law.[1] The Tribe's suit falls squarely within the *Young* doctrine, and the District Court had an obligation to hear it.

The response of today's Court, however, is to deny that obligation. The principal opinion would redefine the doctrine, from a rule recognizing federal jurisdiction to enjoin state officers from violating federal law to a principle of equitable discretion as much at odds with *Young*'s result as with the foundational doctrine on which *Young* rests. JUSTICE O'CONNOR charts a more limited course that wisely rejects the lead opinion's call for federal jurisdiction contingent on case-by-case balancing, but sets forth a rule denying jurisdiction here on Eleventh Amendment grounds because the

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[1] The Tribe originally sought to quiet its claim of title as against the State itself, but the claim was dismissed as barred by the Eleventh Amendment, see 42 F. 3d 1244, 1254 (CA9 1994), and we denied certiorari to review the dismissal. See 517 U. S. 1133 (1996).

Tribe's suit is said to be indistinguishable from one to quiet title to the submerged lands and could leave the State not only without possession of the lands but without present opportunity to regulate them under state law. The Tribe's suit, however, is no more (or less) against the State than any of the claims brought in our prior cases applying *Young*, and the State's regulatory authority would be no more imposed upon than the State's authority in *Young* itself.

While there is reason for great satisfaction that JUSTICE O'CONNOR's view is the controlling one, it is still true that the effect of the two opinions is to redefine and reduce the substance of federal subject-matter jurisdiction to vindicate federal rights. And it is indeed substance, not form, that is here at stake, for this case comes on the heels of last Term's fundamentally erroneous decision in *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44 (1996). Consequently, if an individual or Indian tribe may not enter a federal court to obtain relief against state officers for violating federally derived property rights, that private plaintiff simply may seek no relief in a federal forum.

I respectfully dissent.

I

In *Seminole Tribe*, the Court declared *Ex parte Young* inapplicable to the case before it, having inferred that Congress meant to leave no such avenue of relief open to those claiming federal rights under the statute then under consideration. See *Seminole Tribe*, *supra*, at 73–76. The Court left the basic tenets of *Ex parte Young* untouched, however, see *Seminole Tribe*, *supra*, at 71–75, nn. 14, 16, 17, and Congress remained free to remove any bar to the invocation of *Young*, even in a successive suit by petitioners in *Seminole Tribe* itself.

When Congress has not so displaced the *Young* doctrine, a federal court has jurisdiction in an individual's action against state officers so long as two conditions are met. The plaintiff must allege that the officers are acting in violation of federal law,[2] see *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 106 (1984), and must seek prospective relief to address an ongoing violation, not compensation or other retrospective relief for violations past. See *Green* v. *Mansour*, 474 U. S. 64, 68 (1985); *Quern* v. *Jordan*, 440 U. S. 332, 346–349 (1979); *Edelman* v. *Jordan*, 415 U. S. 651, 664–671 (1974). The Tribe's claim satisfies each condition.

A

The sources of federal law invoked by the Tribe go back to November 8, 1873, when President Grant issued an Executive Order establishing a reservation in the Idaho Territory for the Coeur d'Alene Tribe. See 1 C. Kappler, Indian Affairs: Laws and Treaties 837 (1904). The Tribe claims that the Executive Order, later ratified by Congress, see Act of Mar. 3, 1891, ch. 543, § 19, 26 Stat. 1026–1029, gave it the beneficial interest, subject only to the trusteeship of the United States, in the beds and banks of all navigable water within the reservation, including the submerged land under Lake Coeur d'Alene. See Complaint ¶¶ 19, 24.[3] In complaining that regulatory actions by the petitioner state officers violate the Tribe's right to exclusive use and occupancy of the submerged lands, the Tribe thus claims that they are acting in violation of controlling federal legal authority; since such federal authority happens to be necessary for any valid regulation of Lake Coeur d'Alene's submerged lands and navigable waters, the Tribe in effect claims that petitioners are acting ultra vires as a matter of federal law. Petitioners join issue on just this point, in alleging that the submerged lands were not conveyed by the Executive Order or its ratification but instead passed to Idaho under the equal footing doctrine when Idaho became a State in 1890. Brief for Petitioners 14. While petitioners, as members of the state board of land commissioners, claim to be implementing the law of Idaho in regulating the submerged lands and waters of Lake Coeur d'Alene as a recreational area and health resort, see Idaho Code §§58–104(9) (Supp. 1996), 67–4304 (1989), 67–4305 (Supp. 1996), they agree with the Tribe that title to the submerged lands is controlled by federal law. See Brief for Petitioners 25. The Tribe asked the District Court to enjoin the state officers from "taking any actions or enforcing any State statutes, ordinances, regulations, customs or usages which cause [the Tribe and its members] to be deprived of their rights and privileges of exclusive use and occupancy to all beds and banks of all navigable water courses and all waters within the 1873 Coeur d'Alene Reservation boundaries." Complaint ¶35.

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[2] The principal opinion suggests without citation that "in the plan of the Convention" the States may not have consented to suits in federal courts against state officers that rest on the interpretation of federal law. *Ante*, at 274. Because a suit against a state officer to enjoin an ongoing violation of federal law is not a suit against a State, the scope of state consent to suit at the founding has no bearing on the availability of officer suits under *Young*.

[3] The Tribe also claims to hold unextinguished aboriginal title to the lands, a claim not passed on below, but which we have recognized is based on federal law. See generally *Oneida Indian Nation of N. Y.* v. *County of Oneida*, 414 U. S. 661 (1974).

This is a perfect example of a suit for relief cognizable under *Ex parte Young*. *Young* described the officials' act on the basis of which jurisdiction was found in that case "simply [as] an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. . . . The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." 209 U. S., at 159–160. Later cases have made it clear that a state official's act is also ultra vires for purposes of the *Young* doctrine when it violates other valid federal law. See, *e. g., Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U. S. 682, 698–699 (1949). Such an illegal act amounting to ultra vires action is, of course, what the Tribe claims here.

This case, to be sure, differs from *Young* in two respects, but neither of them affects the Tribe's jurisdictional position. First, the Tribe's claim to have federal law on its side rests upon combined executive and congressional action, not the National Constitution. If the Tribe is right that the National Government conveyed the submerged lands to the Tribe prior to Idaho's admission to statehood, the officials' action is just as devoid of any valid basis as the acts found to be void for unconstitutionality in *Young.* See *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U. S. 670, 675–676, and n. 5, 695–697 (1982) (opinion of STEVENS, J.) (officer suit may proceed where state officers are acting in violation of federal statutory law); see also *Larson, supra,* at 698–699.

The second difference from *Young* is that this case turns on federal law governing passage of title to property; but a government's assumption of title to property is no different from its assumption of any state authority that it may ultimately turn out not to have. That a claim involves title is thus irrelevant under *Young* and has never been treated otherwise. Not only has a title claim never displaced *Young* so as to render state officials immune to suit by a rival claimant, see, *e. g., Treasure Salvors, supra,* but long before *Young* had even been decided *United States* v. *Lee,* 106 U. S. 196 (1882), held federal officers to be subject to a possessory action for land claimed by the United States on the basis of federal law. Since for purposes of *Young* Idaho and its officials claiming title under federal law are in the same posture as the United States and its officers in *Lee,* the appropriate analysis is the one exemplified in that case. See also *Tindal* v. *Wesley,* 167 U. S. 204, 213 (1897) ("[I]t cannot be doubted that the question whether a particular suit is one against the State, within the meaning of the Constitution, must depend upon the same principles that determine whether a particular suit is one against the United States").

In *Lee,* the Court held there was federal jurisdiction over an ejectment suit brought by General Lee's son to oust federal officers from property seized by the United States for alleged nonpayment of taxes and held under an order of the Secretary of War. The defending officials claimed the "absolute immunity from judicial inquiry of every one who *asserts* authority from the executive branch of the government, however clear it may be made that the executive possessed no such power," 106 U. S., at 220 (emphasis in original), but they lost. The Court rejected the proposition that possession of property by federal officers on behalf of the United States sufficed to immunize the officers from a possessory action brought by a private citizen.[4] Lee's suit is seen today as deciding a claim that the officials involved were acting wholly without authority as a matter of constitutional law, since they were barred from dealing with the property by the Government's failure to pay the just compensation required by the Fifth Amendment. See *Larson, supra,* at 697.

Lee thus illustrates that an issue of property title is no different from any other legal or constitutional matter that may have to be resolved in deciding whether the officer of an immune government is so acting beyond his authority as to be amenable to suit without necessarily implicating his government. See *Treasure Salvors, supra,* at 676, 695–697 (opinion of STEVENS, J.) (like this case, involving state officials' reliance on federal law); see also *Tindal, supra,* at 222.[5] Indeed, the decisions of this Court have so held or assumed as far back as the time of Chief Justice Marshall's statement in *United States* v. *Peters,* 5 Cranch 115, 139–140 (1809), that "it certainly can never be alleged, that a mere suggestion of title in a state to property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title." The contrary rule, *Lee* later explained, would "sanctio[n] a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights." *Lee, supra,* at 221. Thus did the Chief Justice foresee that governmental officials are not any the less amenable to suit for relying on their government's claim to property title, and no decision before today's would have turned the envious eyes of the old monarchs toward Idaho.

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[4] The title claims in this case turn not on a constitutional issue but on federal title law; this makes no difference under *Young.* See *Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U. S. 682, 698–699 (1949).

[5] Whether *Tindal* is, or must be, amenable to analysis as a federal ultra vires case we need not now decide; its holding that property title is irrelevant to jurisdictional analysis is not open to question. See 167 U. S., at 222–223.

B

The second condition for applying *Young* is that relief be prospective, not retrospective, a bar to future violations of federal law, not recompense for past mistakes. See *Edelman,* 415 U. S., at 664–666. The present complaint asks for just such relief by seeking to enjoin the State's sport and recreational regulation of the water covering the lands. It asks for no damages for past infringement of the tribal interest asserted and no accounting for fees previously collected by the State in the course of its regulatory oversight. While there would, of course, be significant consequences to the State if the Tribe should prevail on the merits, that will be true whenever *Young* applies. In *Young* itself, the State was left unable to enforce statutory railroad rate regulation or collect penalties from violators, and the *Young* doctrine has been held to apply even when compliance by the defendant officials will create a charge on the state treasury. The relief does not cease to be forward looking, nor is the suit transformed into one against the State itself, so long as its burden upon the State is merely a "necessary consequence of [the officers'] compliance in the future with a substantive federal-question determination." *Edelman, supra,* at 668. See also *Quern* v. *Jordan,* 440 U. S., at 337 (a "federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury"). However burdensome it may be to the State when its officers are ordered to stop violating federal law, it is not the cost of future compliance with federal law, but its character as such, that counts. See, *e. g.*, *id.*, at 347–349; *Milliken* v. *Bradley*, 433 U. S. 267, 288–290 (1977); *Edelman*, *supra*, at 664–668.[6] In this case, of course, the State has not identified any charge on its funds that might be comparable to the cost of compliance approved in *Edelman:* the consequence of any success the Tribe might ultimately have would simply be the end of a regulatory regime (including some fee income) that federal law would show the officers to lack any authority to maintain on the State's behalf.

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[6] While the principal opinion suggests these cases embody a "careful balancing and accommodation of state interests when determining whether the *Young* exception applies in a given case," *ante*, at 278, in fact they simply reflect the Court's effort to demarcate the line between prospective and retrospective relief. That *Young* represents a "balance of federal and state interests," *Papasan* v. *Allain*, 478 U. S. 265, 277 (1986), does not mean the doctrine's application should be balanced against other factors in any given case. Instead, *Young*'s rule recognizing federal judicial power in suits against state officers to enjoin ongoing violations of federal law itself strikes the requisite balance between state and federal interests. Where these conditions are met, no additional "balancing" is required or warranted.

The principal opinion suggests that we held *Young* to apply in *Milliken* v. *Bradley*, 433 U. S. 267 (1977), because the complaint sought to vindicate civil liberties and accordingly involved strong federal interest. See *ante*, at 279. The undeniable federal interest in protecting civil liberties, however, was not the reason we applied the *Young* remedy in *Milliken*. The sole enquiry in this regard was whether the relief sought was fairly characterized as prospective. See 433 U. S., at 289 (noting that decree "fits squarely within the prospective-compliance exception reaffirmed by *Edelman*"). Given that we do not view a suit against a state officer for prospective relief as a suit against the State, the fact, as the majority in *Seminole Tribe* reaffirmed, see *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 59 (1996), that Congress may abrogate state immunity from suit in legislation enacted pursuant to § 5 of the Fourteenth Amendment has no bearing on *Young*'s application.

What this straightforward analysis thus shows, precedent confirms. We have already seen that since the time of *Young,* as well as long before it, this Court has consistently held that a public officer's assertion of property title in the name of a government immune to suit cannot defeat federal jurisdiction over an individual's suit to be rid of interference with the property rights he claims. See, *e. g., Treasure Salvors,* 458 U. S., at 685–690 (opinion of STEVENS, J.); *Tindal,* 167 U. S., at 221–223; *Stanley* v. *Schwalby,* 162 U. S. 255, 270–271 (1896); *Lee,* 106 U. S., at 210. By a parity of reasoning, we have of course drawn the jurisdictional line short of ultimately quieting title (which would run directly against the State itself as putative title holder and not against its officers) or limiting the affected government in any subsequent quiet title action. "It is a judgment to the effect only that, as between the plaintiff and the defendants, the former is entitled to possession of the property in question, the latter having shown no valid authority to withhold possession from the plaintiff." *Tindal, supra,* at 223; see also *Lee, supra,* at 222. If dissatisfied with a federal court's interpretation of federal law in a suit against its officers, a State may itself subsequently "bring any action that may be appropriate to establish and protect whatever claim it has to the premises in dispute."[7] *Tindal, supra,* at 223; *Lee, supra,* at 222 ("[T]he government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights"). See also *Treasure Salvors, supra,* at 688 (opinion of STEVENS, J.).[8] This, of course, is a right that a State always has after an official has lost a *Young* suit, whatever its particular subject.

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[7] One option not available to the State here would be to condemn the lands outright. Federal law prevents the State from exercising eminent domain or otherwise acquiring tribal lands directly from the Tribe. See Rev. Stat. § 2116, 25 U. S. C. § 177. Efforts by state and local governments to regulate or acquire Indian lands accordingly may violate federal law, but cannot exact a taking. Tribes possess the right under federal common law to sue to enforce their possessory rights in land. *County of Oneida* v. *Oneida Indian Nation of N. Y.,* 470 U. S. 226, 235–236 (1985).

In sum, the Tribe seeks no damages or restitution to compensate for the State's exercise of authority over the land, nor does it ask for rescission of a past transfer of property. It says that state officers, by their continuing regulation, are committing an ongoing violation of federal law that may be halted by an injunction against the state officers. If the Tribe were to prove what it claims, it would establish "precisely the type of continuing violation for which a remedy may permissibly be fashioned under *Young.*" *Papasan* v. *Allain,* 478 U. S. 265, 282 (1986).

II

A

The first of the two points common to the opinions displacing *Ex parte Young* here is that this case pierces *Young*'s distinction between State and officer because the relief sought would be indistinguishable in practice from a decree quieting title. See *ante,* at 281 ("Tribe's suit is the functional equivalent of a quiet title action which implicates special sovereignty interests"); *ante,* at 282 (relief sought is "close to the functional equivalent of quiet title"); *ante,* at 289 (opinion of O'CONNOR, J.) ("suit is the functional equivalent of an action to quiet its title"). If this argument were to the point it would, to begin with, render erroneous the holdings in *Treasure Salvors,* for example, and *Lee* (as interpreted by *Larson,* 337 U. S., at 696–697).[9] In each of those cases, too, the individual plaintiffs' success against state officers was an aspersion on the government's claim of title. But a consideration of the alternatives shows why such aspersion was rightly accepted as a fair price to pay for the jurisdiction to consider individual claims of federal right in those two title cases, as it has been accepted generally. The one alternative, of settling the matter of title by compelling the State itself to appear in a federal-question suit, is barred by Eleventh Amendment doctrine. See, *e. g., Seminole Tribe,* 517 U. S., at 54; *Alabama* v. *Pugh,* 438 U. S. 781, 782 (1978) *(per curiam); Chandler* v. *Dix,* 194 U. S. 590, 591 (1904). The other, of leaving an individual powerless to seek any federal remedy for violation of a federal right, would deplete the federal judicial power to a point the Framers could not possibly have intended, given a history of officer liability riding tandem with sovereign immunity extending back to the Middle Ages. See Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 18 (1963); Erlich, No. XII: Proceedings Against the Crown (1216–1377) pp. 28–29, in 6 Oxford Studies in Social and Legal History (P. Vinogradoff ed. 1921). The holdings in *Treasure Salvors* and *Lee*, like the holding that should obtain here, represent a line drawn short of such an extreme, and if the Court may curse it as formalistic so may any line be cursed that must be drawn somewhere between unacceptable extremes. In the title cases cited, as in any other such suit, the State could ultimately settle its title by choosing to litigate the disputed title once and for all; in most cases, of course, the State may choose its own forum, though in this instance it would need the permission of the United States, see n. 8, *supra.* (As that note previously explained, the fact that the United States is required to consent to such a suit against an Indian tribe has nothing to do with the doctrinal basis of *Young* and is hardly an inequity to the States when viewed historically. See n. 11, *infra.*) The line is a fair via media between the extremes.

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[8] In this case, were the District Court to hold for the Tribe and conclude that federal law precludes state regulation, the Quiet Title Act, 28 U. S. C. §2409a, may well preclude the State from bringing a subsequent action to quiet title to the land at issue, unless the United States consents to suit. This fact, however, has no bearing on *Young*'s application. The absence of jurisdiction under the statute to entertain a suit where the Tribe would be the defendant says nothing about whether the Eleventh Amendment, as construed by this Court, bars a suit (*i. e.,* whether the State is the true defendant) where the Tribe is the plaintiff. The two questions are simply independent of each other. Nor (even assuming that the *Young* and sovereign immunity rules are convertible into doctrines of equity) does this state of affairs provide any equitable justification for foreclosing the Tribe's suit: a congressionally imposed limitation on federal-question jurisdiction is hardly a fault within the meaning of equity practice, see, *e. g.,* D. Dobbs, Law of Remedies §2.4(2) (2d ed. 1993), and the Tribe, in any event, bears no responsibility for Congress's decision to enact the statute.

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[9] JUSTICE O'CONNOR says that *Treasure Salvors* is inapposite because the plurality's discussion of the property claim there, in her view, focused on whether the state officials were acting ultra vires state-law authority, see *ante,* at 289–290. But the plurality's analysis in *Treasure Salvors* was not so limited, and noted that the plaintiff salvage company claimed that Florida state officials lacked authority to retain treasure recovered from the sunken galleon because the galleon had been found on submerged land belonging to the United States, not Florida, as determined under the Submerged Lands Act, § 2(b), 67 Stat. 29, 43 U. S. C. § 1301(b), and our decision in *United States* v. *Florida,* 425 U. S. 791 (1976). See *Treasure Salvors,* 458 U. S., at 676, and n. 5. While the plurality noted further that the company claimed that the state officials lacked authority under state law to retain the treasure, see *id.,* at 692–693, there was no question that the company claimed ownership of the treasure under federal law. Accordingly, I disagree both that *Treasure Salvors* is inapplicable and that its reasoning was "narrowed" by *Pennhurst State School and Hospital* v. *Halderman,* 465 U. S. 89 (1984). Cf. *ante,* at 290 (opinion of O'CONNOR, J.).

What is equally significant, finally, is that an officer suit implicating title is no more or less the "functional equivalent" of an action against the government than any other *Young* suit. States are functionally barred from imposing a railroad rate found unconstitutional when enforced by a state officer; States are functionally barred from withholding welfare benefits when their officers have violated federal law on timely payment; States are functionally barred from locking up prisoners whom their wardens are told to release. There is nothing unique about the consequences of an officer suit involving title, and if the Court's reasoning were good in a title case it would be good in any *Young* case.

B

The second joint reason that commands a majority turns on the fact that something more than mere title would be affected if the Tribe were to prevail. As the principal opinion puts it, "[t]he suit seeks, in effect, a determination that the lands in question are not even within the regulatory jurisdiction of the State," *ante*, at 282, and state ownership of submerged lands "uniquely implicate[s] sovereign interests," *ante*, at 284, such that the injunction sought by the Tribe would have an unusual effect on the State's "dignity and status," *ante*, at 287. This is the same reason that JUSTICE O'CONNOR gives for concluding that *Lee* and *Tindal* are not controlling here. See *ante*, at 290–291. She points out that *Lee* and *Tindal* involved claims to land that remained subject to state regulation even after the government officers were held to lack possessory authority, while here, if the Tribe were to prevail, no such regulatory power would be retained given that the submerged lands would no longer be "within Idaho's sovereign jurisdiction." *Ante*, at 289.

While this point is no doubt correct, it has no bearing on *Young*'s application in this case. The relevant enquiry, as noted, is whether the state officers are exercising ultra vires authority over the disputed submerged lands. If they are, a federal court may enjoin their actions, even though such a ruling would place the land beyond Idaho's regulatory jurisdiction and accordingly deny state officers regulatory authority. Idaho indisputably has a significant sovereign interest in regulating its submerged lands, see *Utah Div. of State Lands* v. *United States*, 482 U. S. 193, 195 (1987), but it has no legitimate sovereign interest in regulating submerged lands located outside state borders.

If, indeed, there were any doubt that claims implicating state regulatory jurisdiction are as much subject to *Young* as cases contesting the possession of property, the facts of *Ex parte Young* itself would suffice to place that doubt to rest. *Young* was a suit to enjoin a State's Attorney General from enforcing a state statute regulating railroad rates and threatening violators with heavy sanctions. One would have difficulty imagining a state activity any more central to state sovereignty than such economic regulation or any more expressive of its governmental character than the provision for heavy fines. A State obliged to choose between power to regulate a lake and lake bed on an Indian reservation and power to regulate economic affairs and punish offenders would not (knowing nothing more) choose the lake. Implications for regulatory jurisdiction, therefore, do nothing to displace *Ex parte Young.*

III

The remaining points of exception are, as I understand, confined to the principal opinion.

A

That opinion suggests that the line between officer and State may be dissolved for jurisdictional purposes because the state officials here were acting in accordance with state law in their administration of the disputed land: if state law purports to authorize the acts complained of, they are not unauthorized for purposes of discerning the line between officials and their State under the Eleventh Amendment. *Ante,* at 281, 286–287.

If compliance with state-law authority were a defense to a *Young* suit, however, there would be precious few *Young* suits. State-law compliance is in fact a characteristic circumstance of most cases maintained under *Young,* see, *e. g., Edelman,* 415 U. S., at 655, which are brought not because the defendant officials are mavericks under state law but because the state law is claimed to violate federal law made controlling by the Supremacy Clause. *Young,* accordingly, made it clear from the start that in a federal-question suit against a state official, action in violation of valid federal law was necessarily beyond the scope of any official authority, thus rendering the official an individual for Eleventh Amendment purposes and thus obviating an encroachment on the State's immunity. 209 U. S., at 159–160; see also *Pennhurst*, 465 U. S., at 102–103, 105; *Quern*, 440 U. S., at 337; *Scheuer* v. *Rhodes*, 416 U. S. 232, 237 (1974) (noting that since *Young*, "it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law").

In this case, indeed, the allusion to conformity with state law is doubly misplaced, for it is common ground here that state law is irrelevant if under federal law the combined executive and congressional action vested title to the submerged lands in the Tribe. Each party is claiming under federal law, and the only issue is whether the regulatory action by the state officials is authorized or ultra vires as judged under that federal law. The jurisdictional question is posed, in other words, just as if this were a suit against a federal officer, as in *Larson*, 337 U. S., at 701–702, and this case is essentially like *Treasure Salvors*, 458 U. S., at 675–676, and n. 5, 695–697, in which the outcome turned directly on title under federal law.

B

The principal opinion's next reason for displacing *Young* rests on its view that the declaratory and injunctive relief the Tribe seeks is functionally equivalent to a money judgment and thus would amount to an impermissibly retrospective remedy. "[I]f the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury." *Ante*, at 287. The principal opinion's assumption, in other words, is that intrusiveness is retrospectivity, an equation false to customary language usage and antithetical under extant Eleventh

Amendment doctrine to probably every case decided under *Ex parte Young,* including the original. The exercise of *Young* jurisdiction for vindicating individual federal rights is necessarily "intrusive," simply because state officials sued under *Young* are almost always doing exactly what their States' legislative and administrative authorities intend them to do. The state officers in *Treasure Salvors* were expected to secure 25 percent of the treasure salvaged from a sunken galleon for the State of Florida; an order to bring the treasure before a federal court in admiralty was nothing if not a threat to the State's expectations and intrusive into its affairs. See 458 U. S., at 678–679, 694 (opinion of STEVENS, J.). So was the injunction requiring the issuance of welfare benefits within federally mandated time limits in *Edelman,* see 415 U. S., at 656–659; and the order to get out of Arlington Cemetery in *Lee,* see 106 U. S., at 197, 220–221; and the order barring enforcement of a rail rate regulation in *Young* itself, see 209 U. S., at 132; and any order granting relief in any federal habeas case, see, *e. g., Brennan* v. *Stewart,* 834 F. 2d 1248, 1252, n. 6 (CA5 1988). If intrusiveness were to be a limitation on *Young,* the limitation would be terminal.[10]

C

A third reason proposed by the principal opinion in support of today's result is the supposedly supplemental character of federal-question jurisdiction under *Young,* subject to giving way whenever the private plaintiff would have entree to a state forum able to grant the relief sought. But this is mistaken in theory and contrary to practice.

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[10] Under existing statutes it would not be even a partial answer to say that Congress has the power under § 5 of the Fourteenth Amendment to abrogate state sovereign immunity, as to cases within the subject matter covered by the state habeas statute, 28 U. S. C. § 2254, and Rev. Stat. § 1979, 42 U. S. C. § 1983; habeas claims are directed to state officers, see 28 U. S. C. § 2243; States are not persons subject to suit under § 1983, see *Will* v. *Michigan Dept. of State Police,* 491 U. S. 58, 71 (1989); and in neither instance could Congress be said to have intended to abrogate an immunity arising under the Eleventh Amendment.

Federal-question jurisdiction turns on subject matter, not the need to do some job a state court may wish to avoid; it addresses not the adequacy of a state judicial system, but the responsibility of federal courts to vindicate what is supposed to be controlling federal law. See *Green* v. *Mansour*, 474 U. S., at 68 ("[T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law"); *Pennhurst*, *supra*, at 105 ("[T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States. . . . Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights" (citations and internal quotation marks omitted)). See also *Haring* v. *Prosise*, 462 U. S. 306, 322–323 (1983) (rejecting proposed rule that would relegate certain § 1983 claims to state court in the face of the statute's basic policy of providing a federal forum for vindication of federal rights).[11]

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[11] Many federal cases with nondiverse parties, of course, might well have been brought as state cases if state relief could reasonably have been expected. Section 1983, for example, reflects the "grave congressional concern that the state courts had been deficient in protecting federal rights." *Allen* v. *McCurry*, 449 U. S. 90, 98–99 (1980) (citations omitted). See also *Patsy* v. *Board of Regents of Fla.*, 457 U. S. 496, 503–507 (1982); American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 168 (1968). And when the plaintiff suing the state officers has been an Indian tribe, the readiness of the state courts to vindicate the federal right has been less than perfect. Cf. *United States* v. *Kagama*, 118 U. S. 375, 384 (1886) ("Because of the local ill feeling, the people of the States where [the Indians] are found are often their deadliest enemies"); Comment, *Oneida Nation v. County of Oneida:* Tribal Rights of Action and the Indian Trade and Intercourse Act, 84 Colum. L. Rev. 1852, 1858–1859 (1984) ("State courts . . . were generally hostile to tribal plaintiffs,

Thus, it is hardly surprising that *Ex parte Young* itself gives no hint that the Court thought the relief sought in federal court was unavailable in the Minnesota state courts at the time. *Young,* indeed, relied on prior cases in which federal courts had entertained suits against state officers notwithstanding the fact, as the *Young* Court expressly noted, that state forums were available in which the plaintiffs could have vindicated the same claims. See 209 U. S., at 153–155 (citing *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362 (1894), and *Smyth* v. *Ames,* 169 U. S. 466 (1898)). *Reagan,* like *Young,* was a rate case, in which the plaintiffs sued the State's Railroad Commission and the State Attorney General in federal court, seeking to enjoin enforcement of the commission's rate order and any attempt by the State's Attorney General to recover penalties for its violation. Federal jurisdiction was exercised, even though a state statute authorized suit against the commission in state court. While it is true, as the principal opinion notes, see *ante,* at 274, that the opinion in *Reagan* reflects the then-prevalent view that state consent to suit in a state forum amounted to consent in the federal forum, see *Reagan, supra,* at 392; contra, *Smith* v. *Reeves,* 178 U. S. 436, 441 (1900) (rejecting that view), the *Reagan* Court permitted the suit to proceed in federal court not on the ground that the state statute authorized a state suit but regardless of that point. The Court viewed the case as one to enjoin state officers from enforcing a state statute in violation of federal law, remarking that it "cannot . . . in any fair sense be considered a suit against the State." 154 U. S., at 392. Likewise, in *Smyth,* the historic rate case, a state statute authorized suit in state court to

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for often the states themselves were the primary violators of tribal land rights"); Clinton & Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 Me. L. Rev. 17, 42–49 (1979) (describing the history of state evasions of the federal statutory restraint on alienations of Indian land and the federal response).

challenge the constitutionality of rates imposed on railroads, but the Court permitted the federal suit for injunctive relief against the State Attorney General to go forward on the ground that it was not against the State. See 169 U. S., at 518. Had that not been clear enough, the opinion in *Young* would explain that in *Smyth*, the Court "did not base its decision on that section [of state law authorizing suit in state court] when it held that a suit of the nature of that before it was not a suit against a State, although brought against individual state officers for the purpose of enjoining them from enforcing, either by civil proceeding or indictment, an unconstitutional enactment to the injury of the plaintiff's right." *Young, supra,* at 154.

Nor did the *Young* Court hint that some inadequacy of state remedies was tantamount to the unavailability of a state forum. See *ante*, at 271–274 (principal opinion). The opinion in *Young* and other cases did indeed include observations that remedies available at law might provide inadequate relief to an aggrieved plaintiff, and *Young* itself noted that the failure to comply with the state statute would result in criminal penalties and hefty fines. But these remarks about the severity of the sanctions supported the Court's conviction that an equitable remedy was appropriate, see *Young, supra,* at 148, 163–166; see also *Poindexter* v. *Greenhow,* 114 U. S. 270, 299 (1885), not that a state forum was unavailable or federal jurisdiction subject to state preemption.[12] The principal opinion's notion that availability of a state forum should have some bearing on the applicability of *Ex parte Young* is thus as much at odds with precedent as with basic jurisdictional principles.

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[12] The principal opinion also appears to rest on a misreading of *Osborn* v. *Bank of United States,* 9 Wheat. 738 (1824), as holding that the officer suit could proceed only because a suit directly against the State was prohibited. See *ante,* at 272. Chief Justice Marshall never suggested that a suit against the officers "would be barred" if the State could be named. Instead, he made clear that since the suit would be allowed to proceed if the State could be made a party, it should be allowed to proceed in its absence. The Chief Justice wrote: "[I]t would be subversive of the best established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong, which they would

There is one more strike against the principal opinion's assumption that there is some significance in the availability of a state forum. The day the Court decided *Young,* it also decided *General Oil Co.* v. *Crain,* 209 U. S. 211 (1908). *General Oil* reviewed an order of the Supreme Court of Tennessee dismissing a corporation's suit against a state officer for relief from what it claimed was his violation of the National Constitution. The state court had said it lacked jurisdiction in the matter after construing the suit as one against the State, which was immune as sovereign. This Court held the dismissal to be reversible error,[13] ruling as a matter of federal law that the suit could not have been construed as being against the State. See *id.,* at 226–228. State law conferring immunity on its officers could not, in other words, constitutionally excuse a state court of general jurisdiction from an obligation to hear a suit brought to enjoin a state official's action as exceeding his authority because unconstitutional.[14]

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afford against him, could his principal be joined in suit." *Osborn,* 9 Wheat., at 843. And while the Court recognized the equitable remedy provided relief "more beneficial and complete than the law can give," *id.,* at 845, the Court did not suggest that a remedy in state court was absent, or that any significance attached to the availability of a state forum.

[13] The judgment was not actually reversed because the Court reached the previously unreviewed challenge to the official's action and found it meritless. See *General Oil Co.* v. *Crain,* 209 U. S., at 231.

[14] *General Oil*'s application is not limited to those cases in which a remedy in federal court is unavailable, notwithstanding the observation that state relief was required given the Eleventh Amendment bar to suit in federal court, *General Oil Co.* v. *Crain,* 209 U. S., at 226, since *Young* ensured that the federal courts would be open for injunctive claims just like those at issue in *General Oil.* See Fallon, The Ideologies of Federal Courts Law, 74 Va. L. Rev. 1141, 1209, n. 312 (1988) (sentences surrounding the references in *General Oil* to an unavailable federal forum make clear that "the crucial distinction determining the obligations of the state courts is not one involving the availability or nonavailability of federal judicial relief; it is, rather, 'between valid and invalid state laws, as determining'

Cf. *Martinez* v. *California*, 444 U. S. 277, 284 (1980) (state immunity statute cannot immunize an officer from a § 1983 suit in state court). The consequence is that in every case in which *Ex parte Young* supports the exercise of federal-question jurisdiction against a state officer, *General Oil* prohibits the declination of state jurisdiction over the same officer on state immunity grounds. Insofar as state-court jurisdiction would count against *Ex parte Young* in one case,[15] it would presumably count against it as heavily in every case.

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whether the suit is one against the state . . . . Because a state cannot authorize its officers to behave unconstitutionally, official action pursuant to an invalid state law cannot be protected by sovereign immunity; and a state court cannot decline to exercise jurisdiction on this basis") (quoting *General Oil, supra,* at 226); Monaghan, Third Party Standing, 84 Colum. L. Rev. 277, 294, n. 97 (1984) ("[I]f prospective relief is a necessary concomitant of a federal right, availability of such relief in federal courts may not free the states from an obligation to provide it as well").

Nor was *General Oil* overruled or otherwise "abandoned" by *Georgia R. R. & Banking Co.* v. *Musgrove*, 335 U. S. 900 (1949), in which the Court dismissed an appeal from a decision of the Supreme Court of Georgia holding that state sovereign immunity barred suits asserting constitutional claims against state officials. Cf. 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4024, pp. 363–364 (2d ed. 1996). The one-paragraph *per curiam* dismissal in *Musgrove* stated that an adequate nonfederal ground supported the state court's decision but did not identify the state ground involved; the posture of the case suggests that the Court may have viewed the lower court's decision as based on a valid state law regarding the timing and not the existence of state remedies. See Fallon, *supra,* at 1211, n. 317.

Finally, insofar as *General Oil* may be read to require that States provide some adequate judicial remedy to redress acts of state officials that violate federal law, see, *e. g.*, Collins, Article III Cases, State Court Duties, and the Madisonian Compromise, 1995 Wis. L. Rev. 39, 164, n. 359, but not necessarily injunctive relief in particular, its relevance for our purposes remains the same, that is, that every litigant seeking prospective relief in federal court under *Young* may obtain some adequate redress in state court as well.

[15] Quite apart even from what *General Oil* may mandate, it appears that in all 50 States, as a matter of course, private plaintiffs may obtain declaratory and injunctive relief in state court for the acts of state officials in

IV

None of the considerations that the principal opinion would weigh in the course of its balancing process in this

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circumstances where relief would be available in federal court under *Young.* Some state courts have announced as a general rule that a suit seeking to enjoin acts by a state official that violate federal law, or are otherwise unauthorized, is not a suit against the State. See, *e. g., Aland* v. *Graham,* 287 Ala. 226, 229–230, 250 So. 2d 677, 679 (1971); *Etheredge* v. *Bradley,* 480 P. 2d 414, 416 (Alaska 1971); *Doe* v. *Heintz,* 204 Conn. 17, 31–32, 526 A. 2d 1318, 1326 (1987); *Georgia Public Service Comm'n* v. *Atlanta Gas Light Co.,* 205 Ga. 863, 869–874, 55 S. E. 2d 618, 623–625 (1949); *W. H. Greenwell, Ltd.* v. *Department of Land and Natural Resources,* 50 Haw. 207, 208–209, 436 P. 2d 527, 528 (1968); *Century Distilling Co.* v. *Defenbach,* 61 Idaho 192, 200–203, 99 P. 2d 56, 59–60 (1940); *Noorman* v. *Department of Public Works & Buildings,* 366 Ill. 216, 220–222, 8 N. E. 2d 637, 639, appeal dism'd, 302 U. S. 637 (1937); *Rockford Memorial Hospital* v. *Department of Human Rights,* 272 Ill. App. 3d 751, 754–758, 651 N. E. 2d 649, 653–655, appeal denied, 163 Ill. 2d 586, 657 N. E. 2d 638 (1995); *Collins* v. *State Bd. of Social Welfare,* 248 Iowa 369, 372–373, 81 N. W. 2d 4, 6 (1957); *Board of Trustees of the Univ. of Ky.* v. *Hayse,* 782 S. W. 2d 609, 616 (Ky. 1989), cert. denied, 497 U. S. 1025 and 498 U. S. 938 (1990); *Carso* v. *Board of Liquidation of State Debt,* 205 La. 368, 371–374, 17 So. 2d 358, 360 (1944); *Jones* v. *Maine State Highway Comm'n,* 238 A. 2d 226, 229–230 (Me. 1968); *Thompson* v. *Auditor General,* 261 Mich. 624, 628–630, 247 N. W. 360, 362 (1933); *L. K.* v. *Gregg,* 425 N. W. 2d 813, 818, n. 3 (Minn. 1988); *Kleban* v. *Missouri,* 363 Mo. 7, 15–17, 247 S. W. 2d 832, 837 (1952); *Rein* v. *Johnson,* 149 Neb. 67, 68–69, 30 N. W. 2d 548, 551–552 (1947), cert. denied, 335 U. S. 814 (1948); *Grinnell* v. *State,* 121 N. H. 823, 825–826, 435 A. 2d 523, 525 (1981); *Abelson's, Inc.* v. *New Jersey State Board of Optometrists,* 5 N. J. 412, 416–418, 75 A. 2d 867, 869 (1950); *Ramah Navaho School Bd.* v. *Bureau of Revenue,* 104 N. M. 302, 308, 720 P. 2d 1243, 1249 (Ct. App. 1986); *Carter* v. *City of Las Cruces,* 121 N. M. 580, 583, 915 P. 2d 336, 338 (Ct. App. 1996); *Corum* v. *University of North Carolina,* 330 N. C. 761, 771, and n. 3, 772, 413 S. E. 2d 276, 283, and n. 2 (1992); *Ennis* v. *Dasovick,* 506 N. W. 2d 386, 392 (N. D. 1993); *Schwarz* v. *Board of Trustees,* 31 Ohio St. 3d 267, 271–274, 510 N. E. 2d 808, 812–813 (1987); *Gast* v. *State,* 36 Ore. App. 441, 443–447, 585 P. 2d 12, 15–17 (1978); *Philadelphia Life Ins. Co.* v. *Commonwealth,* 410 Pa. 571, 574–577, 190 A. 2d 111, 113–114 (1963); *Ware Shoals Mfg. Co.* v. *Jones,* 78 S. C. 211, 216–219, 58 S. E. 811, 813 (1907); *White Eagle Oil & Refining Co.* v. *Gunderson,* 48 S. D. 608, 614–619, 205 N. W. 614, 617–618 (1925); *American* case is a legitimate reason for questioning jurisdiction over the state officials, and nothing about property title or regulatory jurisdiction justifies the majority's exception to *Young*'s guarantee of a federal forum to a private federal claimant against state officials.

Trucking Associations, Inc. v. *Conway,* 146 Vt. 579, 586–587, 508 A. 2d 408, 413 (1986); *State ex rel. Robinson* v. *Superior Court,* 182 Wash. 277, 281–284, 46 P. 2d 1046, 1049–1050 (1935); *Pittsburgh Elevator Co.* v. *West Va. Bd. of Regents,* 310 S. E. 2d 675, 685 (W. Va. 1983); *Wisconsin Fertilizer Assn.* v. *Karns,* 39 Wis. 2d 95, 100–102, 158 N. W. 2d 294, 297 (1968); *Oyler* v. *State,* 618 P. 2d 1042, 1047–1048 (Wyo. 1980).

Other States have permitted such suits to proceed without discussing the jurisdictional basis for the action. See, *e. g., Carroll* v. *Robinson,* 178 Ariz. 453, 458–459, 874 P. 2d 1010, 1015 (Ct. App. 1994); *Honor* v. *Yamuchi,* 307 Ark. 324, 330–332, 820 S. W. 2d 267, 271–272 (1991); *Endler* v. *Schutzbank,* 68 Cal. 2d 162, 180–182, 436 P. 2d 297, 310–311 (1968); *International Society for Krishna Consciousness, Inc.* v. *Colorado State Fair & Industrial Exposition Comm'n,* 199 Colo. 265, 268–269, 610 P. 2d 486, 489 (1980); *Gebhart* v. *Belton,* 33 Del. Ch. 144, 91 A. 2d 137 (1952), rev'd on other grounds, 349 U. S. 294 (1955); *Mercer* v. *Hemmings,* 170 So. 2d 33, 35 (Fla. 1964); *Libertarian Party of Florida* v. *Smith,* 660 So. 2d 807 (Dist. Ct. App. Fla. 1995); *Darling* v. *Kansas Water Office,* 245 Kan. 45, 52–54, 774 P. 2d 941, 947 (1989); *Gumbhir* v. *Kansas State Bd. of Pharmacy,* 231 Kan. 507, 512–515, 646 P. 2d 1078, 1084 (1982); *Secretary of State* v. *Bryson,* 244 Md. 418, 423–424, 428–429, 224 A. 2d 277, 280, 283 (1966); *Maryland Comm. for Fair Representation* v. *Tawes,* 228 Md. 412, 423–427, 439–440, 180 A. 2d 656, 662–663, 671 (1962); *Apkin* v. *Treasurer & Receiver General,* 401 Mass. 427, 428–430, 517 N. E. 2d 141, 141–142 (1988); *Wicks* v. *Mississippi Valley State Univ.,* 536 So. 2d 20 (Miss. 1988); *Orozco* v. *Day,* 934 P. 2d 1009, 1017 (Mont. 1997); *Northern Nevada Assn. of Injured Workers* v. *Nevada State Industrial Insurance System,* 107 Nev. 108, 115–116, 807 P. 2d 728, 733 (1991); *New York Central R. Co.* v. *Lefkowitz,* 12 N. Y. 2d 305, 309–310, 189 N. E. 2d 695, 697 (1963); *Owner-Operator Independent Drivers Assn.* v. *Anthony,* 879 P. 2d 845, 847–848 (Okla. Ct. App. 1994); *Retired Adjunct Professors of the State of Rhode Island* v. *Almond,* 690 A. 2d 1342, 1348 (R. I. 1997); *Riggs* v. *Burson,* 941 S. W. 2d 44 (Tenn. 1997); *Sanders* v. *State Dept. of Public Welfare,* 472 S. W. 2d 179, 183–184 (Ct. App. Tex. 1971), error dism'd (1972); *H. L.* v. *Matheson,* 604 P. 2d 907 (Utah 1979), aff'd, 450 U. S. 398 (1981); *State Bd. of Elections* v. *Forb,* 214 Va. 264, 265–266, 199 S. E. 2d 527, 528 (1973).

LINDH *v.* MURPHY, WARDEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 96–6298. Argued April 14, 1997—Decided June 23, 1997

Wisconsin tried petitioner Lindh on noncapital murder and attempted murder charges. In response to his insanity defense, the State called a psychiatrist who had examined Lindh but who had come under criminal investigation for sexual exploitation of patients before the trial began. Lindh's attempt to question the doctor about that investigation in hopes of showing the doctor's interest in currying favor with the State was barred by the trial court, and Lindh was convicted. He was denied relief on his direct appeal, in which he claimed a violation of the Confrontation Clause. He raised that claim again in a federal habeas corpus application, which was denied, and he promptly appealed. Shortly after oral argument before the Seventh Circuit, the Antiterrorism and Effective Death Penalty Act of 1996 (Act) amended the federal habeas statute. Following an en banc rehearing to consider the Act's impact, the court held that the amendments to chapter 153 of Title 28, which governs all habeas proceedings, generally apply to cases pending on the date of enactment; that applying the new version of 28 U. S. C. § 2254(d)—which governs standards affecting entitlement to relief—to pending cases would not have a retroactive effect barring its application under *Landgraf* v. *USI Film Products*, 511 U. S. 244, because it would not attach new legal consequences to events preceding enactment; and that the statute applied to Lindh's case.

Held: Since the new provisions of chapter 153 generally apply only to cases filed after the Act became effective, they do not apply to pending noncapital cases such as Lindh's. Pp. 324–337.

(a) Wisconsin errs in arguing that whenever a new statute on its face could apply to the litigation of events preceding enactment, there are only two alternative sources of rules to determine its ultimate temporal reach: either Congress's express command or application of the *Landgraf* default rule governing retroactivity. Normal rules of construction apply in determining a statute's temporal reach generally and whether a statute's terms would produce a retroactive effect. Although *Landgraf's* rule would deny application when a retroactive effect would otherwise result, other construction rules may apply to remove even the possibility of retroactivity (as by rendering the statutory provision wholly inapplicable to a particular case), as Lindh argues the recognition of a negative implication would do here. Pp. 324–326.

(b) The statute reveals Congress's general intent to apply the chapter 153 amendments only to cases filed after its enactment. The Act revised chapter 153 for all habeas proceedings. Then § 107 of the Act created an entirely new chapter 154 for habeas proceedings in capital cases, with special rules favorable to those States that meet certain conditions. Section 107(c) expressly applies chapter 154 to pending cases. The negative implication is that the chapter 153 amendments were meant to apply only to cases filed after enactment. If Congress was reasonably concerned to ensure that chapter 154 applied to pending cases, only a different intent explains the fact that it did not enact a similar provision for chapter 153. Had the chapters evolved separately and been joined together at the last minute, after chapter 154 had acquired its mandate, there might have been a possibility that Congress intended the same rule for each chapter, but was careless in the rough-and-tumble. But those are not the circumstances here: § 107(c) was added after the chapters were introduced as a single bill. Section 107(c)'s insertion thus illustrates the familiar rule that negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted. See *Field* v. *Mans*, 516 U. S. 59. Respondent's one competing explanation—that § 107(c) was intended to fix an ambiguity over when a State would qualify for chapter 154's favorable rules—is too remote to displace the straightforward inference that chapter 153 was not meant to apply to pending cases. Finally, while new § 2264(b)—which was enacted within chapter 154 and provides that new §§ 2254(d) and (e) in chapter 153 would apply to pending chapter 154 cases—does not speak to the present issue with flawless clarity, it tends to confirm the interpretation of § 107(c) adopted here. It shows that Congress assumed that in the absence of § 2264(b), new §§ 2254(d) and (e) would not apply to pending cases. Pp. 326–337.

96 F. 3d 856, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, GINSBURG, and BREYER, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, in which SCALIA, KENNEDY, and THOMAS, JJ., joined, *post*, p. 337.

James S. Liebman argued the cause for petitioner. With him on the briefs were *Richard C. Neuhoff* and *Keith A. Findley.*

Sally L. Wellman, Assistant Attorney General of Wisconsin, argued the cause for respondent. With her on the brief was *James E. Doyle*, Attorney General.*

JUSTICE SOUTER delivered the opinion of the Court.

The Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, signed into law on April 24, 1996, enacted the present 28 U. S. C. § 2254(d) (1994 ed., Supp. II). The issue in this case is whether that new section of the statute dealing with petitions for habeas corpus governs applications in noncapital cases that were already pending when the Act was passed. We hold that it does not.

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* *Judy Clarke* and *Lisa Kemler* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Ohio et al. by *Betty D. Montgomery*, Attorney General of Ohio, *Jeffrey S. Sutton*, State Solicitor, and *Simon B. Karas* and *Jon C. Walden*, Assistant Attorneys General, *Christine O. Gregoire*, Attorney General of Washington, and *Paul D. Weisser* and *John J. Samson*, Assistant Attorneys General, *John M. Bailey*, Chief States Attorney of Connecticut, and *Gus F. Diaz*, Acting Attorney General of Guam, joined by the Attorneys General for their respective jurisdictions as follows: *Bill Pryor* of Alabama, *Bruce M. Botelho* of Alaska, *Grant Woods* of Arizona, *Winston Bryant* of Arkansas, *Daniel E. Lungren* of California, *Gale A. Norton* of Colorado, *M. Jane Brady* of Delaware, *Robert Butterworth* of Florida, *Michael J. Bowers* of Georgia, *Margery S. Bronster* of Hawaii, *Alan G. Lance* of Idaho, *James E. Ryan* of Illinois, *Jeffrey A. Modisett* of Indiana, *Carla J. Stovall* of Kansas, *A. B. Chandler III* of Kentucky, *Richard P. Ieyoub* of Louisiana, *Scott Harshbarger* of Massachusetts, *Frank J. Kelley* of Michigan, *Hubert Humphrey III* of Minnesota, *Mike Moore* of Mississippi, *Jeremiah W. Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Peter Verniero* of New Jersey, *Dennis C. Vacco* of New York, *Michael F. Easley* of North Carolina, *Heidi Heitkamp* of North Dakota, *Drew Edmondson* of Oklahoma, *D. Michael Fisher* of Pennsylvania, *Jeffrey B. Pine* of Rhode Island, *Charles M. Condon* of South Carolina, *Mark Barnett* of South Dakota, *John Knox Walkup* of Tennessee, *Jan Graham* of Utah, *James B. Gilmore III* of Virginia, *Julio A. Brady* of the Virgin Islands, and *William U. Hill* of Wyoming; for the Criminal Justice Legal Foundation by *Kent S. Scheidegger;* and for the Washington Legal Foundation by *Daniel J. Popeo*, *Paul D. Kamenar*, and *Ronald D. Maines*.

I

Wisconsin tried Aaron Lindh on multiple charges of murder and attempted murder. In response to his insanity defense, the State called a psychiatrist who had spoken with Lindh immediately after the killings but had later, and before Lindh's trial, come under criminal investigation by the State for sexual exploitation of some of his patients. Although, at trial, Lindh tried to ask the psychiatrist about that investigation, hoping to suggest the witness's interest in currying favor with the State, the trial court barred the questioning. Lindh was convicted.

On direct appeal, Lindh claimed a violation of the Confrontation Clause of the National Constitution, but despite the denial of relief, Lindh sought neither review in this Court nor state collateral review. Instead, on July 9, 1992, he filed a habeas corpus application in the United States District Court, in which he again argued his Confrontation Clause claim. When relief was denied in October 1995, Lindh promptly appealed to the Seventh Circuit. Shortly after oral argument there, however, the federal habeas statute was amended, and the Seventh Circuit ordered Lindh's case be reheard en banc to see whether the new statute applied to Lindh and, if so, how his case should be treated.

The Court of Appeals held that the Act's amendments to chapter 153 of Title 28 generally did apply to cases pending on the date of enactment. 96 F. 3d 856, 863 (1996). Since the court did not read the statute as itself answering the questions whether or how the newly amended version of § 2254(d) would apply to pending applications like Lindh's, *id.*, at 861–863, it turned to this Court's recent decision in *Landgraf* v. *USI Film Products*, 511 U. S. 244 (1994). *Landgraf* held that, where a statute did not clearly mandate an application with retroactive effect, a court had to determine whether applying it as its terms ostensibly indicated would have genuinely retroactive effect; if so, the judicial presumption against retroactivity would bar its application. The Seventh Circuit concluded that applying the new § 2254(d) to cases already pending would not have genuinely retroactive effect because it would not attach "new legal consequences" to events preceding enactment, and the court held the statute applicable to Lindh's case. 96 F. 3d, at 863–867 (citing *Landgraf, supra,* at 270). On the authority of the new statute, the court then denied relief on the merits. 96 F. 3d, at 868–877.

The Seventh Circuit's decision that the new version of § 2254(d) applies to pending, chapter 153 cases conflicts with the holdings of *Edens* v. *Hannigan,* 87 F. 3d 1109, 1112, n. 1 (CA10 1996), *Boria* v. *Keane,* 90 F. 3d 36, 37–38 (CA2 1996) *(per curiam),* and *Jeffries* v. *Wood,* 114 F. 3d 1484 (CA9 1997). In accord with the Seventh Circuit is the § 2253(c) case of *Hunter* v. *United States,* 101 F. 3d 1565, 1568–1573 (CA11 1996) (en banc) (relying on *Lindh* to hold certain amendments to chapter 153 applicable to pending cases). We granted certiorari limited to the question whether the new § 2254(d) applies to Lindh's case, 519 U. S. 1074 (1996), and we now reverse.

II

Before getting to the statute itself, we have to address Wisconsin's argument that whenever a new statute on its face could apply to the litigation of events that occurred before it was enacted, there are only two alternative sources of rules to determine its ultimate temporal reach: either an "express command" from Congress or application of our *Landgraf* default rule. In *Landgraf,* we said:

> "When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default

> rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect . . . . If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Landgraf, supra,* at 280.

Wisconsin insists that this language means that, in the absence of an express command regarding temporal reach, this Court must determine that temporal reach for itself by applying its judicial default rule governing retroactivity, to the exclusion of all other standards of statutory interpretation. Brief for Respondent 9–14; see also *Hunter* v. *United States, supra,* at 1569 (suggesting that *Landgraf* may have announced a general clear-statement rule regarding the temporal reach of statutes).

Wisconsin's reading, however, ignores context. The language quoted disposed of the question whether the practice of applying the law as it stands at the time of decision represented a retreat from the occasionally conflicting position that retroactivity in the application of new statutes is disfavored. The answer given was no, and the presumption against retroactivity was reaffirmed in the traditional rule requiring retroactive application to be supported by a clear statement. *Landgraf* thus referred to "express command[s]," "unambiguous directive[s]," and the like where it sought to reaffirm that clear-statement rule, but only there. See *Landgraf* v. *USI Film Products,* 511 U. S., at 263 ("[U]nambiguous directive" is necessary to authorize "retroactive application"); *id.,* at 264 (statutes "will not be construed to have retroactive effect unless their language requires this result" (internal quotation marks and citation omitted)); *id.,* at 272–273 ("Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application"); *id.,* at 286 (finding "no clear evidence of congressional intent" to rebut the "presumption against statutory retroactivity"); *id.*, at 286 (SCALIA, J., concurring in judgment) (agreeing that "a legislative enactment affecting substantive rights does not apply retroactively absent *clear statement* to the contrary").

In determining whether a statute's terms would produce a retroactive effect, however, and in determining a statute's temporal reach generally, our normal rules of construction apply. Although *Landgraf*'s default rule would deny application when a retroactive effect would otherwise result, other construction rules may apply to remove even the possibility of retroactivity (as by rendering the statutory provision wholly inapplicable to a particular case), as Lindh argues the recognition of a negative implication would do here. In sum, if the application of a term would be retroactive as to Lindh, the term will not be applied, even if, in the absence of retroactive effect, we might find the term applicable; if it would be prospective, the particular degree of prospectivity intended in the Act will be identified in the normal course in order to determine whether the term does apply to Lindh.

III

The statute reveals Congress's intent to apply the amendments to chapter 153 only to such cases as were filed after the statute's enactment (except where chapter 154 otherwise makes select provisions of chapter 153 applicable to pending cases). Title I of the Act stands more or less independent of the Act's other titles[1] in providing for the revision of federal habeas practice and does two main things. First, in §§ 101–106, it amends § 2244 and §§ 2253–2255 of chapter 153 of Title 28 of the United States Code, governing all habeas corpus proceedings in the federal courts.[2] 110 Stat. 1217–

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[1] The other titles address such issues as restitution to victims of crime (Title II), various aspects of international terrorism (Titles II, III, IV, VII, VIII), restrictions on various kinds of weapons and explosives (Titles V and VI), and miscellaneous items (Title IX). See 110 Stat. 1214–1217.

[2] Section 103 also amends Rule 22 of the Federal Rules of Appellate Procedure. 110 Stat. 1218.

1221. Then, for habeas proceedings against a State in capital cases, § 107 creates an entirely new chapter 154 with special rules favorable to the state party, but applicable only if the State meets certain conditions, including provision for appointment of postconviction counsel in state proceedings.[3] 110 Stat. 1221–1226. In § 107(c), the Act provides that "Chapter 154 . . . shall apply to cases pending on or after the date of enactment of this Act." 110 Stat. 1226.

We read this provision of § 107(c), expressly applying chapter 154 to all cases pending at enactment, as indicating implicitly that the amendments to chapter 153 were assumed and meant to apply to the general run of habeas cases only when those cases had been filed after the date of the Act. The significance of this provision for application to pending cases becomes apparent when one realizes that when chapter 154 is applicable, it will have substantive as well as purely procedural effects. If chapter 154 were merely procedural in a strict sense (say, setting deadlines for filing and disposition, see 28 U. S. C. §§ 2263, 2266 (1994 ed., Supp. II); 110 Stat. 1223, 1224–1226), the natural expectation would be that it would apply to pending cases. *Landgraf, supra,* at 275 (noting that procedural changes "may often be applied in suits arising before their enactment without raising concerns about retroactivity"). But chapter 154 does more, for in its revisions of prior law to change standards of proof and persuasion in a way favorable to a State, the statute goes beyond "mere" procedure to affect substantive entitlement to relief. See 28 U. S. C. § 2264(b) (1994 ed., Supp. II); 110 Stat. 1223 (incorporating revised legal standard of new § 2254(d)). *Landgraf* did not speak to the rules for determining the temporal reach of such a statute (having no need to do so). While the statute might not have a true retroactive effect, neither was it clearly "procedural" so as to fall within the

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[3] Section 108 further adds a "technical amendment" regarding expert and investigative fees for the defense under 21 U. S. C. § 848(q). 110 Stat. 1226.

Court's express (albeit qualified) approval of applying such statutes to pending cases. Since *Landgraf* was the Court's latest word on the subject when the Act was passed, Congress could have taken the opinion's cautious statement about procedural statutes and its silence about the kind of provision exemplified by the new § 2254(d) as counseling the wisdom of being explicit if it wanted such a provision to be applied to cases already pending. While the terms of § 107(c) may not amount to the clear statement required for a mandate to apply a statute in the disfavored retroactive way,[4] they do serve to make it clear as a general matter that

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[4] In *United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 34–37 (1992), this Court held that the existence of "plausible" alternative interpretations of statutory language meant that that language could not qualify as an "unambiguous" expression of a waiver of sovereign immunity. And cases where this Court has found truly "retroactive" effect adequately authorized by a statute have involved statutory language that was so clear that it could sustain only one interpretation. See *Graham & Foster* v. *Goodcell,* 282 U. S. 409, 416–420 (1931) (holding that a statutory provision "was manifestly intended to operate retroactively according to its terms" where the tax statute spelled out meticulously the circumstances that defined the claims to which it applied and where the alternative interpretation was absurd); *Automobile Club of Mich.* v. *Commissioner,* 353 U. S. 180, 184 (1957) (finding a clear statement authorizing the Commissioner of Internal Revenue to correct tax rulings and regulations "retroactively" where the statutory authorization for the Commissioner's action spoke explicitly in terms of "retroactivity"); *United States* v. *Zacks,* 375 U. S. 59, 65–67 (1963) (declining to give retroactive effect to a new substantive tax provision by reopening claims otherwise barred by statute of limitations and observing that Congress had provided for just this sort of retroactivity for other substantive provisions by explicitly creating new grace periods in which otherwise barred claims could be brought under the new substantive law). Cf. *Seminole Tribe of Fla.* v. *Florida,* 517 U. S. 44, 55–57 (1996) (finding a clear statement of congressional abrogation of Eleventh Amendment immunity where the federal statute went beyond granting federal jurisdiction to hear a claim and explicitly contemplated "the State" as defendant in federal court in numerous provisions of the Act).

Landgraf suggested that the following language from an unenacted precursor of the statute at issue in that case might possibly have qualified as a clear statement for retroactive effect: "[This Act] shall apply to *all* chapter 154 applies to pending cases when its terms fit those cases at the particular procedural points they have reached. (As to that, of course, there may well be difficult issues, and it may be that application of *Landgraf's* default rule will be necessary to settle some of them.)

The next point that is significant for our purposes is that everything we have just observed about chapter 154 is true of changes made to chapter 153. As we have already noted, amended § 2254(d) (in chapter 153 but applicable to chapter 154 cases) governs standards affecting entitlement to relief. If, then, Congress was reasonably concerned to ensure that chapter 154 be applied to pending cases, it should have been just as concerned about chapter 153, unless it had the different intent that the latter chapter not be applied to the general run of pending cases.

Nothing, indeed, but a different intent explains the different treatment. This might not be so if, for example, the two chapters had evolved separately in the congressional process, only to be passed together at the last minute, after chapter 154 had already acquired the mandate to apply it to pending cases. Under those circumstances, there might have been a real possibility that Congress would have intended the same rule of application for each chapter, but in the rough-and-tumble no one had thought of being careful about chapter 153, whereas someone else happened to think of inserting a

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proceedings pending on or commenced after the date of enactment of this Act." 511 U. S., at 260 (emphasis added; internal quotation marks omitted). But, even if that language did qualify, its use of the sort of absolute language absent from § 107(c) distinguishes it. Cf. *United States* v. *Williams*, 514 U. S. 527, 531–532 (1995) (finding a waiver of sovereign immunity "unequivocally expressed" in language granting jurisdiction to the courts over "*[a]ny* civil action against the United States for the recovery of *any* internal-revenue tax alleged to have been *erroneously* or illegally assessed or *collected*" (emphasis in *Williams;* internal quotation marks omitted)); *id.*, at 541 (SCALIA, J., concurring) ("The [clear-statement] rule does not . . . require explicit waivers to be given a meaning that is implausible . . .").

provision in chapter 154. But those are not the circumstances here. Although chapters 153 and 154 may have begun life independently and in different Houses of Congress,[5] it was only after they had been joined together and introduced as a single bill in the Senate (S. 735) that what is now § 107(c) was added.[6] Both chapters, therefore, had to have been in mind when § 107(c) was added. Nor was there anything in chapter 154 prior to the addition that made the intent to apply it to pending cases less likely than a similar intent to apply chapter 153. If anything, the contrary is true, as the discussion of § 2264(b) will indicate.

The insertion of § 107(c) with its different treatments of the two chapters thus illustrates the familiar rule that negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted. See *Field* v. *Mans,* 516 U. S. 59, 75 (1995) ("The more apparently deliberate the contrast, the stronger the inference, as applied, for example, to contrasting statutory sections originally enacted simultaneously in relevant respects . . ."). When § 107(c) was added, that is, a thoughtful Member of the Congress was most likely to have intended just what the later reader sees by inference.

The strength of the implication is not diminished by the one competing explanation suggested, see Brief for Respondent 11–12, which goes as follows. Chapter 154 provides for expedited filing and adjudication of habeas applications in capital cases when a State has met certain conditions. In general terms, applications will be expedited (for a State's benefit) when a State has made adequate provision for counsel to represent indigent habeas applicants at the State's expense. Thus, § 2261(b) provides that "[t]his chapter is applicable if a State establishes . . . a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners . . . ." 110 Stat. 1221–1222. There is an ambiguity in the provision just quoted, the argument runs, for it applies chapter 154 to capital cases only where "a State establishes . . . a mechanism," leaving a question whether the chapter would apply if a State had already established such a mechanism before chapter 154 was passed. The idea is that the present tense of the word "establishes" might be read to rule out a State that already had "established" a mechanism, suggesting that when § 107(c) was added to provide that the chapter would apply to "cases pending" it was meant to eliminate the ambiguity by showing that all pending cases would be treated alike.

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[5] See 96 F. 3d 856, 861 (CA7 1996). Lindh concedes this much. Brief for Petitioner 23, n. 15.

[6] Amendment 1199, offered by Senator Dole on May 25, 1995, added what was then § 607(c) and now is § 107(c). See 141 Cong. Rec. 14600, 14614 (1995). A comparison of S. 735 as it stood on May 1, 1995, and S. 735 as it passed the Senate on June 7, after the substitution of Amendment 1199, reveals that the part of the bill dealing with habeas corpus reform was substantially the same before and after the amendment in all ways relevant to our interpretation of § 107(c).

This explanation of the significance of § 107(c) is not, however, very plausible. First, one has to strain to find the ambiguity on which the alternative explanation is supposed to rest. Why would a Congress intent on expediting capital habeas cases have wanted to disfavor a State that already had done its part to promote sound resolution of prisoners' petitions in just the way Congress sought to encourage? It would make no sense to leave such States on the slower track, and it seems unlikely that federal courts would so have interpreted § 2261(b). Second, anyone who had seen such ambiguity lurking could have dispatched it in a far simpler and straightforward fashion than enacting § 107(c); all the drafter would have needed to do was to insert three words into § 2261(b), to make it refer to a State that "establishes or has established . . . a mechanism." It simply is not plausible that anyone so sensitive as to find the unlikely ambiguity would be so delphic as to choose § 107(c) to fix it. Indeed, § 107(c) would (on the ambiguity hypothesis) be at least as uncertain as the language it was supposed to clarify, since "cases pending" could be read to refer to cases pending in States that set up their mechanisms only after the effective date of the Act. The hypothesis of fixing ambiguity, then, is too remote to displace the straightforward inference that chapter 153 was not meant to apply to pending cases.

Finally, we should speak to the significance of the new § 2264(b), which Lindh cites as confirming his reading of § 107(c) of the Act. While § 2264(b) does not speak to the present issue with flawless clarity, we agree with Lindh that it tends to confirm the interpretation of § 107(c) that we adopt. Section 2264(b) is a part of the new chapter 154 and provides that "[f]ollowing review subject to subsections (a), (d), and (e) of § 2254, the court shall rule on the claims [subject to expedited consideration] before it." 110 Stat. 1223. As we have said before, § 2254 is part of chapter 153 applying to habeas cases generally, including cases under chapter 154. Its subsection (a) existed before the Act, simply providing for a habeas remedy for those held in violation of federal law. Although § 2254 previously had subsections lettered (d) and (e) (dealing with a presumption of correctness to be accorded state-court factual findings and the production of state-court records when evidentiary sufficiency is challenged, respectively) the Act eliminated the old (d) and relettered the old (e) as (f); in place of the old (d), it inserted a new (d) followed by a new (e), the two of them dealing with, among other things, the adequacy of state factual determinations as bearing on a right to federal relief, and the presumption of correctness to be given such state determinations. 110 Stat. 1219. It is to these new provisions (d) and (e), then, that § 2264(b) refers when it provides that chapter 154 determinations shall be made subject to them.

Leaving aside the reference to § 2254(a) for a moment, why would Congress have provided specifically in § 2264(b) that chapter 154 determinations shall be made subject to §§ 2254(d) and (e), given the fact that the latter are part of chapter 153 and thus independently apply to habeas generally? One argument is that the answer lies in § 2264(a), which (in expedited capital cases) specially provides an exhaustion requirement (subject to three exceptions), restricting federal habeas claims to those "raised and decided on the merits in the State courts. . . ." 110 Stat. 1223. See 96 F. 3d, at 862–863. The argument assumes (and we will assume for the sake of the argument) that in expedited capital cases, this provision of § 2264(a) supersedes the requirements for exhaustion of state remedies imposed as a general matter by §§ 2254(b) and (c).[7] The argument then goes on, that § 2264(b) is explicit in applying §§ 2254(d) and (e) to such capital cases in order to avoid any suggestion that when Congress enacted § 2264(a) to supersede §§ 2254(b) and (c) on exhaustion, Congress also meant to displace the neighboring provisions of §§ 2254(d) and (e) dealing with such things as the status of state factual determinations. But we find this unlikely. First, we find it hard to imagine why anyone would read a superseding exhaustion rule to address the applicability not just of the other exhaustion requirement but of provisions on the effect of state factual determinations. Anyone who did read the special provision for exhaustion in capital cases to supersede not only the general exhaustion provisions but evidentiary status and presumption provisions as well would have had to assume that Congress could reasonably have meant to leave the law on expedited capital cases (which is more favorable to the States that fulfill its conditions) without any presumption of the correctness of relevant state factual determinations. This would not, we think, be a reasonable reading and thus not a reading that Congress would have feared and addressed through § 2264(b). We therefore have to find a different function for the express requirement of § 2264(b) that chapter 154 determinations be made in accordance with §§ 2254(d) and (e).

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[7] There are reasons why the position that § 2264(a) replaces rather than complements §§ 2254(b) and (c) is open to doubt: Lindh argues with some force that to read § 2264(a) as replacing the exhaustion requirement of §§ 2254(b) and (c) would mean that in important classes of cases (those in the categories of three § 2264(a) exceptions), the State would not be able to insist on exhaustion in the state courts. In cases raising claims of newly discovered evidence, for example, the consequence could be that the State could not prevent the prisoner from going directly to federal court and evading § 2254(e)'s presumption of correctness of state-court factual findings as well as § 2254(d)'s new, highly deferential standard for evaluating state-court rulings. It is true that a State might be perfectly content with the prisoner's choice to go straight to federal court in some cases, but the State has been free to waive exhaustion to get that result. The State has not explained why Congress would have wanted to deprive the States of the § 2254 exhaustion tools in chapter 154 cases, and we are hard pressed to come up with a reason, especially considering the Act's apparent general purpose to enhance the States' capacities to control their own adjudications. It would appear that the State's reading of § 2264(a) would also eliminate from chapter 154 cases the provisions of § 2254 that define the exhaustion requirement explicitly as requiring a claim to be raised by any and every available procedure in the State, 28 U. S. C. § 2254(c), that newly authorize federal courts to deny unexhausted claims on the merits, § 2254(b)(2), and that newly require a State's waiver of

Continuing on the State's assumption that § 2264(a) replaces rather than complements § 2254's exhaustion provisions, we can see that the function of providing that §§ 2254(d) and (e) be applicable in chapter 154 cases is, in fact,

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exhaustion to be shown to be express, § 2254(b)(3). No explanation for why Congress would have wanted to deny the States these advantages is apparent or offered by the parties, which suggests that no such effects were intended at all but that § 2264(a) was meant as a supplement to rather than a replacement for §§ 2254(b) and (c).

Nevertheless, as stated in the text, we assume for the sake of argument that the State's understanding of § 2264(a) as replacing rather than complementing the chapter 153 exhaustion requirements for chapter 154 is the correct one. Forceful arguments can be made on each side, and we do not need to resolve the conflict here.

supportive of the negative implication apparent in § 107(c). There would have been no need to provide expressly that subsections (d) and (e) would apply with the same temporal reach as the entirely new provisions of chapter 154 if all the new provisions in both chapters 153 and 154 were potentially applicable to cases pending when the Act took effect, as well as to those filed later. If the special provision for applying §§ 2254(d) and (e) in cases under chapter 154 has any utility, then, it must be because subsections (d) and (e) might not apply to all chapter 154 cases; since chapter 154 and the new sections of chapter 153 unquestionably apply alike to cases filed after the Act took effect, the cases to which subsections (d) and (e) from chapter 153 would not apply without express provision must be those cases already pending when the Act took effect. The utility of § 2264(b), therefore, is in providing that when a pending case is also an expedited capital case subject to chapter 154, the new provisions of §§ 2254(d) and (e) will apply to that case. The provision thus confirms that Congress assumed that in the absence of such a provision, §§ 2254(d) and (e) (as new parts of chapter 153) would not apply to pending federal habeas cases.

This analysis is itself consistent, in turn, with Congress's failure in § 2264(b) to make any express provision for applying §§ 2254(f), (g), (h), or (i). Subsections (f) and (g) deal with producing state-court evidentiary records and their admissibility as evidence. Congress would obviously have wanted these provisions to apply in chapter 154 pending cases, but because they were old provisions, which had already attached to "pending" capital habeas cases (only their letter designations had been amended), Congress had no need to make any special provision for their application to pending capital habeas cases that might immediately or later turn out to be covered by chapter 154. Subsections (h) and (i), however, are new; if Congress wanted them to apply to chapter 154 cases from the start it would on our hypotheses have had to make the same special provision that § 2264(b) made for subsections (d) and (e). But there are reasons why Congress need not have made any special provisions for subsections (h) and (i) to apply to the "pending" chapter 154 cases. Subsections (h) and (i) deal, respectively, with the appointment of counsel for the indigent in the federal proceeding, and the irrelevance to habeas relief of the adequacy of counsel's performance in previous postconviction proceedings. See 110 Stat. 1219–1220. There was no need to make subsection (h) immediately available to pending cases, capital or not, because 21 U. S. C. § 848(q)(4)(B) already authorized appointment of counsel in such cases. And there was no reason to make subsection (i) immediately available for a State's benefit in expedited capital cases, for chapter 154 already dealt with the matter in § 2261(e), see 110 Stat. 1222. There is, therefore, a good fit of the § 2264(b) references with the inference that amendments to chapter 153 were meant to apply only to subsequently filed cases; where there was a good reason to apply a new chapter 153 provision in the litigation of a chapter 154 case pending when the Act took effect, § 2264(b) made it applicable, and when there was no such reason it did no such thing.

There is only one loose end. Section 2254(a) was an old provision, without peculiar relevance to chapter 154 cases, but applicable to them without any need for a special provision; as an old provision it was just like the lettered subsections (f) and (g). Why did § 2264(b) make an express provision for applying it to chapter 154 cases? No answer leaps out at us. All we can say is that in a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting.

The upshot is that our analysis accords more coherence to §§ 107(c) and 2264(b) than any rival we have examined. That is enough. We hold that the negative implication of § 107(c) is that the new provisions of chapter 153 generally apply only to cases filed after the Act became effective. Because Lindh's case is not one of these, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA, JUSTICE KENNEDY, and JUSTICE THOMAS join, dissenting.

The Court in this case conducts a truncated inquiry into a question of congressional intent, and, I believe, reaches the wrong result. The Court begins, uncontroversially enough, by observing that application of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) to pending cases depends upon congressional intent, and that our inquiry into that intent should rely upon the "normal rules" of statutory construction. *Ante*, at 326. The Court then proceeds, however, to disregard all of our retroactivity case law—which it rather oddly disparages as manifestations of "*Landgraf*'s default rule," *ibid.*—in favor of a permissible, but by no means controlling, negative inference that it draws from the statutory text. I would instead interpret the AEDPA in light of the whole of our longstanding retroactivity jurisprudence, and accordingly find that the amended 28 U. S. C. § 2254(d) (1994 ed., Supp. II) applies to pending cases.

The first question we must ask is whether Congress has expressly resolved whether the provision in question applies to pending cases. *Landgraf* v. *USI Film Products*, 511 U. S. 244, 280 (1994). Here, the answer is plainly no. The AEDPA does not clearly state, one way or the other, whether chapter 153 applies to pending cases. Given congressional silence, we must still interpret that statute, and that interpretation is in turn guided by the retroactivity principles we have developed over the years. The Court relies on one canon of statutory interpretation, *expressio unius est exclusio alterius,* to the exclusion of all others.

The Court's opinion rests almost entirely on the negative inference that can be drawn from the fact that Congress expressly made chapter 154, pertaining to capital cases, applicable to pending cases, but did not make the same express provision in regards to chapter 153. That inference, however, is by no means necessary, nor is it even clearly the best inference possible. Certainly, Congress might have intended that omission to signal its intent that chapter 153 not apply to pending cases. But there are other, equally plausible, alternatives.

First, because chapter 154's applicability is conditioned upon antecedent events—namely, a State's establishing qualifying capital habeas representation procedures—Congress could have perceived a greater likelihood that, absent express provision otherwise, courts would fail to apply that chapter's provisions to pending capital cases. Second, because of the characteristically extended pendency of collateral attacks on capital convictions,[1] and because of Congress' concern with the perceived acquiescence in capital defendants' dilatory tactics by some federal courts (as evidenced by chapter 154's strict time limits for adjudication of capital cases and, indeed, by the very title of the statute, the "Antiterrorism and *Effective Death Penalty* Act of 1996"), Congress could very well have desired to speak with exacting clarity as to the applicability of the AEDPA to pending capital cases. Or third, Congress, while intending the AEDPA definitely to apply to pending capital cases, could have been uncertain or in disagreement as to which of the many portions of chapter 153 should or should not apply to pending cases. Congress could simply have assumed that the courts would sort out such questions, using our ordinary retroactivity presumptions.

None of these competing inferences is clearly superior to the others. The Court rejects the first, *ante*, at 330–332, as an "implausible" solution to an "unlikely" ambiguity. But the solution is not nearly as implausible as the Court's contention that, in order to show that it wished chapter *153 not* to apply to pending cases, Congress chose to make chapter *154 expressly applicable* to such cases. If Congress wanted to make chapter 153 inapplicable to pending cases, the simplest way to do so would be to say so. But, if Congress was instead concerned that courts would interpret chapter 154, because of its contingent nature, as not applying to pending cases, the most direct way to solve that concern would be the solution it adopted: expressly stating that chapter 154 did indeed apply to pending cases.

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[1] See, *e. g.*, Pet. for Habeas Corpus in *In re Mata*, O. T. 1995, No. 96–5679, p. 7 (describing how it took nine years and three months for a Federal District Court to deny, and the Ninth Circuit to affirm, petitioner's first federal capital habeas petition).

The Court finds additional support for its inference in the new 28 U. S. C. § 2264(b) (1994 ed., Supp. II), which it believes "tends to confirm," *ante,* at 332, its analysis. Section 2264 is part of chapter 154 and forbids (subject to narrow exceptions) federal district courts to consider claims raised by state capital defendants unless those claims were first raised and decided on the merits in state court. Section 2264(b) provides, "[f]ollowing review subject to subsections (a), (d), and (e) of section 2254 [contained within chapter 153], the court shall rule on the claims properly before it." This section, I believe, is irrelevant to the question before us.

The Court's somewhat tortured interpretation of this section, as a backhanded way of making §§ 2254(a), (d), and (e) (but not the rest of chapter 153) apply to pending cases, is not convincing. For one thing, § 2264(b) is not phrased at all as a timing provision; rather than containing temporal language applying select sections to pending cases, § 2264(b) speaks in present tense, about how review should be conducted under chapter 154. Even more tellingly, as the Court implicitly concedes when it blandly describes this provision as a "loose end," *ante,* at 336, the AEDPA did not alter § 2254(a), and so there is no need for an express provision making it applicable to pending cases.

Chapter 154 establishes special procedures for capital prisoners. Section 2264(b), by its terms, makes clear that

§§ 2254(a), (d), and (e) apply to chapter 154 proceedings. That clarification makes sense in light of § 2264(a), which replaces the exhaustion requirement of §§ 2254(b) and (c) with a requirement that federal courts consider (subject to narrow exceptions) only those claims "raised and decided on the merits in the State courts." Without that clarification, doubt might exist as to whether the rest of § 2254 still applied in capital proceedings.

Petitioner protests that to read § 2264(a) as supplanting §§ 2254(b) and (c) would produce "outlandish" results, Brief for Petitioner 26, a conclusion that the Court finds plausible, *ante*, at 333–334, and n. 7 (although it ultimately assumes otherwise). The result would have to be "outlandish," indeed, before a court should refuse to apply the language chosen by Congress, but no such result would obtain here. Petitioner and the Court both fail to appreciate the different litigating incentives facing capital and noncapital defendants. Noncapital defendants, serving criminal sentences in prison, file habeas petitions seeking to be released, presumably as soon as possible. They have no incentive to delay. In such circumstances, §§ 2254(b) and (c) quite reasonably require that their habeas claims be filed first in state courts, so that the state judicial apparatus may have the first opportunity to address those claims. In contrast, capital defendants, facing impending execution, seek to avoid being executed. Their incentive, therefore, is to utilize every means possible to delay the carrying out of their sentence. It is, therefore, not at all "outlandish" for Congress to have concluded that in such circumstances §§ 2254(b) and (c) exhaustion would needlessly prolong capital proceedings and that § 2264(a)'s requirement that a claim have been raised and decided on the merits in state court was a sufficient protection of States' interests in exhaustion.[2]

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[2] This conclusion would also be consistent with the conclusions of the Powell Committee, which was convened to address the problems in capital habeas cases and upon whose recommendations chapter 154 was substan-

At this point the Court's analysis stops. Based on the weak inference from Congress' designation of chapter 154 as applying to pending cases and a strained reading of § 2264, the Court concludes that Congress impliedly intended for chapter 153 not to apply to pending cases. I would go on, and apply our ordinary retroactivity principles, as Congress no doubt assumed that we would.

First, we have generally applied new procedural rules to pending cases. *Landgraf,* 511 U. S., at 275; see also *Beazell* v. *Ohio,* 269 U. S. 167, 170–171 (1925); *Ex parte Collett,* 337 U. S. 55, 71 (1949); *Dobbert* v. *Florida,* 432 U. S. 282, 293–294 (1977); *Collins* v. *Youngblood,* 497 U. S. 37, 45 (1990). This is because "rules of procedure regulate secondary rather than primary conduct." *Landgraf, supra,* at 275. Here, the primary conduct occurred when Lindh murdered two people in the sheriff's office of the City-County Building in Madison, Wisconsin. Obviously, the AEDPA in no way purports to regulate that past conduct. Lindh's state-court proceedings constituted secondary conduct. Under our retroactivity

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tially based. See Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal (Aug. 23, 1989). The Committee's Comment to Proposed § 2259 (which tracks the AEDPA's § 2264) explained as follows: "As far as new or 'unexhausted' claims are concerned, [this section] represents a change in the exhaustion doctrine as articulated in *Rose* v. *Lundy,* 455 U. S. 509 (1982). [This section] bars such claims from consideration unless one of the . . . exceptions is applicable. The prisoner cannot return to state court to exhaust even if he would like to do so. On the other hand, if [an exception] is applicable, the district court is directed to conduct an evidentiary hearing and to rule on the new claim without first exhausting state remedies as *Rose* v. *Lundy* now requires. Because of the existence of state procedural default rules, *exhaustion is futile in the great majority of cases.* It serves the state interest of comity in theory, but in practice it results in delay and undermines the state interest in the finality of its criminal convictions. *The Committee believes that the States would prefer to see post-conviction litigation go forward in capital cases, even if that entails a minor subordination of their interest in comity as it is expressed in the exhaustion doctrine.*" *Id.,* at 22–23 (emphasis added).

precedents, were his state proceedings in federal court, we would have then applied existing procedural law, even though Lindh's primary conduct occurred some time earlier. The federal habeas proceeding at issue here is, in a sense, tertiary conduct. It is not the actual criminal conduct prohibited by law, nor is it the proceeding to determine whether the defendant in fact committed such conduct. Rather, it is a collateral proceeding that, in effect, attacks the judgment of the prior state proceeding. Section 2254(d), the precise section at issue here, simply alters the standard under which that prior judgment is evaluated, and is in that sense entirely procedural. Cf. *Horning* v. *District of Columbia,* 254 U. S. 135, 139 (1920) (applying newly enacted harmless-error statute, which changed the standard under which prior judgments were evaluated, to pending case).

Second, we have usually applied changes in law to prospective forms of relief. *Landgraf, supra,* at 273; see also *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, 464 (1921); *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U. S. 184, 201 (1921); *Hall* v. *Beals,* 396 U. S. 45, 48 (1969) *(per curiam); Kaiser Aluminum & Chemical Corp.* v. *Bonjorno,* 494 U. S. 827, 852 (1990) (SCALIA, J., concurring). Unlike damages actions, which are "quintessentially backward looking," *Landgraf, supra,* at 282, the writ of habeas corpus is prospective in nature. Habeas does not compensate for past wrongful incarceration, nor does it punish the State for imposing it. See *Lane* v. *Williams,* 455 U. S. 624, 631 (1982). Instead, habeas is a challenge to unlawful custody, and when the writ issues it prevents further illegal custody. See *Preiser* v. *Rodriguez,* 411 U. S. 475, 489, 494 (1973).

Finally, we have regularly applied statutes ousting jurisdiction to pending litigation.[3] *Landgraf, supra,* at 274; see also *Bruner* v. *United States,* 343 U. S. 112, 116–117, and n. 8 (1952) ("Congress has not altered the nature or validity of petitioner's rights or the Government's liability but has simply reduced the number of tribunals authorized to hear and determine such rights and liabilities"); *Hallowell* v. *Commons,* 239 U. S. 506, 508 (1916); *Sherman* v. *Grinnell,* 123 U. S. 679, 680 (1887); *Assessors* v. *Osbornes,* 9 Wall. 567, 575 (1870); *Ex parte McCardle,* 7 Wall. 506, 514 (1869); *Insurance Co.* v. *Ritchie,* 5 Wall. 541, 544–545 (1867). This is because such statutes "'speak to the power of the court rather than to the rights or obligations of the parties.'" *Landgraf, supra,* at 274 (quoting *Republic Nat. Bank of Miami* v. *United States,* 506 U. S. 80, 100 (1992) (THOMAS, J., concurring)); see also 511 U. S., at 293 (SCALIA, J., concurring in judgment) ("Our jurisdiction cases are explained, I think, by the fact that the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power—so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised"). This is the principle most relevant to the case at hand.

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[3] Although in *Hughes Aircraft Co.* v. *United States ex rel. Schumer,* 520 U. S. 939 (1997), we recently rejected a presumption favoring retroactivity for jurisdiction-*creating* statutes, see *id.,* at 950–951, nothing in *Hughes*

There is a good argument that § 2254(d) is itself jurisdictional. See *Brown* v. *Allen,* 344 U. S. 443, 460 (1953) ("Jurisdiction over applications for federal habeas corpus is controlled by statute"); *Sumner* v. *Mata,* 449 U. S. 539, 547, n. 2 (1981) ("The present codification of the federal habeas statute is the successor to 'the first congressional grant of jurisdiction to the federal courts,' and the 1966 amendments embodied in § 2254(d) [now codified, as amended by the AEDPA, at § 2254(e)] were intended by Congress as limitations on the exercise of that jurisdiction" (quoting *Preiser* v. *Rodriguez, supra,* at 485)); cf. *Arkansas* v. *Farm Credit Servs. of Central Ark.,* 520 U. S. 821, 826 (1997) (explaining that the Tax Injunction Act—which has operative language similar to

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disparaged our longstanding practice of applying jurisdiction-*ousting* statutes to pending cases.

§ 2254(d) ("The district courts shall not enjoin . . .")—is "first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes" (internal quotation marks omitted)). But even if it is not jurisdictional, it shares the most salient characteristic of jurisdictional statutes: Its commands are addressed to courts rather than to individuals. Section 2254(d) does not address criminal defendants, or even state prosecutors; it prescribes or proscribes no private conduct. Instead, it is addressed directly to federal courts, providing, "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court *shall not be granted* . . . unless . . . ." (Emphasis added.)

Whether the approach is framed in terms of "retroactive effect," as the *Landgraf* majority put it, 511 U. S., at 280, or in terms of "the relevant activity that the rule regulates," as JUSTICE SCALIA's concurrence put it, see *id.*, at 291 (opinion concurring in judgment), our longstanding practice of applying procedural, prospective, and jurisdiction-ousting statutes to pending cases must play an important part in the decision. These principles all favor application of § 2254(d) to pending cases.

It is a procedural statute, regulating prospective relief, and addressed directly to federal courts and removing their power to give such relief in specified circumstances. Our cases therefore strongly suggest that, absent congressional direction otherwise, we should apply § 2254(d) to pending cases. This is not because of any peculiar characteristic intrinsic to the writ of habeas corpus, but rather because modifications to federal courts' authority to issue the writ are necessarily of that stripe—procedural, prospective, and addressed to courts. It is therefore not surprising that the parties have not pointed us to a single case where we have found a modification in the scope of habeas corpus relief inapplicable to pending cases. To the contrary, respondent and *amici* have pointed instead to the uniform body of our cases applying such changes to all pending cases. This has been true both of statutory changes in the scope of the writ, see, *e. g., Gusik* v. *Schilder*, 340 U. S. 128, 131–133, and n. 4 (1950) (applying 1948 habeas amendments to pending claims); *Smith* v. *Yeager*, 393 U. S. 122, 124–125 (1968) *(per curiam)* (applying 1966 habeas amendments to pending claims); *Carafas* v. *LaVallee*, 391 U. S. 234, 239 (1968) (same); *Felker* v. *Turpin*, 518 U. S. 651 (1996) (applying different section of the AEDPA to pending case), and of judicial changes, see, *e. g., Stone* v. *Powell*, 428 U. S. 465, 495, n. 38 (1976) (rejecting petitioner's contention that change in law should apply prospectively); *Sumner* v. *Mata, supra*, at 539, 549–551 (applying presumption of correctness of state-court findings of fact to pending case); *Wainwright* v. *Sykes*, 433 U. S. 72 (1977) (applying the cause and prejudice doctrine to pending case); *Brecht* v. *Abrahamson*, 507 U. S. 619, 638–639 (1993) (applying actual prejudice standard to pending case).

Because the Court's inquiry is incomplete, I believe it has reached the wrong result in this case. I would affirm the judgment of the Court of Appeals.

KANSAS *v.* HENDRICKS

CERTIORARI TO THE SUPREME COURT OF KANSAS

No. 95–1649. Argued December 10, 1996—Decided June 23, 1997*

Kansas' Sexually Violent Predator Act establishes procedures for the civil commitment of persons who, due to a "mental abnormality" or a "personality disorder," are likely to engage in "predatory acts of sexual violence." Kansas filed a petition under the Act in state court to commit respondent (and cross-petitioner) Hendricks, who had a long history of sexually molesting children and was scheduled for release from prison. The court reserved ruling on Hendricks' challenge to the Act's constitutionality, but granted his request for a jury trial. After Hendricks testified that he agreed with the state physician's diagnosis that he suffers from pedophilia and is not cured and that he continues to harbor sexual desires for children that he cannot control when he gets "stressed out," the jury determined that he was a sexually violent predator. Finding that pedophilia qualifies as a mental abnormality under the Act, the court ordered him committed. On appeal, the State Supreme Court invalidated the Act on the ground that the precommitment condition of a "mental abnormality" did not satisfy what it perceived to be the "substantive" due process requirement that involuntary civil commitment must be predicated on a "mental illness" finding. It did not address Hendricks' *ex post facto* and double jeopardy claims.

Held:

1. The Act's definition of "mental abnormality" satisfies "substantive" due process requirements. An individual's constitutionally protected liberty interest in avoiding physical restraint may be overridden even in the civil context. *Jacobson* v. *Massachusetts*, 197 U. S. 11, 26. This Court has consistently upheld involuntary commitment statutes that detain people who are unable to control their behavior and thereby pose a danger to the public health and safety, provided the confinement takes place pursuant to proper procedures and evidentiary standards. *Foucha* v. *Louisiana*, 504 U. S. 71, 80. The Act unambiguously requires a precommitment finding of dangerousness either to one's self or to others, and links that finding to a determination that the person suffers from a "mental abnormality" or "personality disorder." Generally, this Court has sustained a commitment statute if it couples proof of dangerousness

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*Together with No. 95–9075, *Hendricks* v. *Kansas*, also on certiorari to the same court.

with proof of some additional factor, such as a "mental illness" or "mental abnormality," see, *e. g., Heller* v. *Doe,* 509 U. S. 312, 314–315, for these additional requirements serve to limit confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control. The Act sets forth comparable criteria with its precommitment requirement of "mental abnormality" or "personality disorder." Contrary to Hendricks' argument, this Court has never required States to adopt any particular nomenclature in drafting civil commitment statutes and leaves to the States the task of defining terms of a medical nature that have legal significance. Cf. *Jones* v. *United States,* 463 U. S. 354, 365, n. 13. The legislature is therefore not required to use the specific term "mental illness" and is free to adopt any similar term. Pp. 356–360.

2. The Act does not violate the Constitution's double jeopardy prohibition or its ban on *ex post facto* lawmaking. Pp. 360–371.

(a) The Act does not establish criminal proceedings, and involuntary confinement under it is not punishment. The categorization of a particular proceeding as civil or criminal is a question of statutory construction. *Allen* v. *Illinois,* 478 U. S. 364, 368. Nothing on the face of the Act suggests that the Kansas Legislature sought to create anything other than a civil commitment scheme. That manifest intent will be rejected only if Hendricks provides the clearest proof that the scheme is so punitive in purpose or effect as to negate Kansas' intention to deem it civil. *United States* v. *Ward,* 448 U. S. 242, 248–249. He has failed to satisfy this heavy burden. Commitment under the Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence. Its purpose is not retributive: It does not affix culpability for prior criminal conduct, but uses such conduct solely for evidentiary purposes; it does not make criminal conviction a prerequisite for commitment; and it lacks a scienter requirement, an important element in distinguishing criminal and civil statutes. Nor can the Act be said to act as a deterrent, since persons with a mental abnormality or personality disorder are unlikely to be deterred by the threat of confinement. The conditions surrounding confinement—essentially the same as conditions for any civilly committed patient—do not suggest a punitive purpose. Although the commitment scheme here involves an affirmative restraint, such restraint of the dangerously mentally ill has been historically regarded as a legitimate nonpunitive objective. Cf. *United States* v. *Salerno,* 481 U. S. 739, 747. The confinement's potentially indefinite duration is linked, not to any punitive objective, but to the purpose of holding a person until his mental abnormality no longer causes him to be a threat to others. He is thus permitted immediate release upon a showing that he is no longer dangerous, and the longest he can be detained pursuant to a single judicial proceeding is one year. The State's use of procedural safeguards applicable in criminal trials does not itself turn the proceedings into criminal prosecutions. *Allen, supra,* at 372. Finally, the Act is not necessarily punitive if it fails to offer treatment where treatment for a condition is not possible, or if treatment, though possible, is merely an ancillary, rather than an overriding, state concern. The conclusion that the Act is nonpunitive removes an essential prerequisite for both Hendricks' double jeopardy and *ex post facto* claims. Pp. 360–369.

(b) Hendricks' confinement does not amount to a second prosecution and punishment for the offense for which he was convicted. Because the Act is civil in nature, its commitment proceedings do not constitute a second prosecution. Cf. *Jones, supra.* As this commitment is not tantamount to punishment, the detention does not violate the Double Jeopardy Clause, even though it follows a prison term. *Baxstrom* v. *Herold,* 383 U. S. 107. Hendricks' argument that, even if the Act survives the "multiple punishments" test, it fails the "same elements" test of *Blockburger* v. *United States,* 284 U. S. 299, is rejected, since that test does not apply outside of the successive prosecution context. Pp. 369–370.

(c) Hendricks' *ex post facto* claim is similarly flawed. The *Ex Post Facto* Clause pertains exclusively to penal statutes. *California Dept. of Corrections* v. *Morales,* 514 U. S. 499, 505. Since the Act is not punishment, its application does not raise *ex post facto* concerns. Moreover, the Act clearly does not have retroactive effect. It does not criminalize conduct legal before its enactment or deprive Hendricks of any defense that was available to him at the time of his crimes. Pp. 370–371.

259 Kan. 246, 912 P. 2d 129, reversed.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined. KENNEDY, J., filed a concurring opinion, *post,* p. 371. BREYER, J., filed a dissenting opinion, in which STEVENS and SOUTER, JJ., joined, and in which GINSBURG, J., joined as to Parts II and III, *post,* p. 373.

Carla J. Stovall, Attorney General of Kansas, argued the cause for the petitioner in No. 95–1649 and respondent in No. 95–9075. With her on the briefs were *Stephen R. McAllister,* Special Assistant Attorney General, *Bernard Nash, James van R. Springer,* and *Laura B. Feigin.*

Thomas J. Weilert argued the cause for Hendricks in both cases. With him on the briefs were *James W. Ellis* and *David Gottlieb*.†

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†Briefs of *amici curiae* urging reversal were filed for the State of Washington et al. by *Christine O. Gregoire*, Attorney General of Washington, and *Sarah Blackman Sappington*, Assistant Attorney General, *Charles F. C. Ruff*, Corporation Counsel of the District of Columbia, *Sebastian Aloot*, Acting Attorney General of the Northern Mariana Islands, and by the Attorneys General for their respective jurisdictions as follows: *Jeff Sessions* of Alabama, *Malaetasi Togafu* of American Samoa, *Grant Woods* of Arizona, *Winston Bryant* of Arkansas, *Daniel E. Lungren* of California, *Gale A. Norton* of Colorado, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Calvin E. Holloway, Sr.*, of Guam, *Margery S. Bronster* of Hawaii, *Alan G. Lance* of Idaho, *James E. Ryan* of Illinois, *Pamela Fanning Carter* of Indiana, *Thomas J. Miller* of Iowa, *A. B. Chandler III* of Kentucky, *Richard P. Ieyoub* of Louisiana, *J. Joseph Curran, Jr.*, of Maryland, *Hubert H. Humphrey III* of Minnesota, *Mike Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Jeffrey R. Howard* of New Hampshire, *Peter Verniero* of New Jersey, *Tom Udall* of New Mexico, *Dennis C. Vacco* of New York, *Michael F. Easley* of North Carolina, *Heidi Heitkamp* of North Dakota, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Pedro R. Pierluisi* of Puerto Rico, *Jeffrey B. Pine* of Rhode Island, *Charles Molony Condon* of South Carolina, *Mark W. Barnett* of South Dakota, *Jan Graham* of Utah, *Jeffrey L. Amestoy* of Vermont, *Julio A. Brady* of the Virgin Islands, *James S. Gilmore III* of Virginia, and *William U. Hill* of Wyoming; for the State of Wisconsin by *James E. Doyle*, Attorney General, and *Sally L. Wellman* and *Mary E. Burke*, Assistant Attorneys General; for the Menninger Foundation et al. by *Philip Allen Lacovara, James C. Geoly*, and *Robert Teir;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Scott A. W. Johnson, Laura J. Buckland, Steven R. Shapiro, Christopher A. Hansen*, and *Bruce Winick;* for the American Psychiatric Association by *Richard G. Taranto;* for the National Association of Criminal Defense Lawyers et al. by *David A. Reiser, Jennifer P. Lyman, Barbara E. Bergman*, and *James F. Vano;* for the National Mental Health Association by *Ira A. Burnim;* for the Seattle-King County Defender Association et al. by *Robert C. Boruchowitz, Addie*

JUSTICE THOMAS delivered the opinion of the Court.

In 1994, Kansas enacted the Sexually Violent Predator Act, which establishes procedures for the civil commitment of persons who, due to a "mental abnormality" or a "personality disorder," are likely to engage in "predatory acts of sexual violence." Kan. Stat. Ann. § 59–29a01 *et seq.* (1994). The State invoked the Act for the first time to commit Leroy Hendricks, an inmate who had a long history of sexually molesting children, and who was scheduled for release from prison shortly after the Act became law. Hendricks challenged his commitment on, *inter alia,* "substantive" due process, double jeopardy, and *ex post facto* grounds. The Kansas Supreme Court invalidated the Act, holding that its precommitment condition of a "mental abnormality" did not satisfy what the court perceived to be the "substantive" due process requirement that involuntary civil commitment must be predicated on a finding of "mental illness." *In re Hendricks,* 259 Kan. 246, 261, 912 P. 2d 129, 138 (1996). The State of Kansas petitioned for certiorari. Hendricks subsequently filed a cross-petition in which he reasserted his federal double jeopardy and *ex post facto* claims. We granted certiorari on both the petition and the cross-petition, 518 U. S. 1004 (1996), and now reverse the judgment below.

I

A

The Kansas Legislature enacted the Sexually Violent Predator Act (Act) in 1994 to grapple with the problem of managing repeat sexual offenders.[1] Although Kansas al-

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Hailstorks, John Stuart, Eric Janus, John T. Philipsborn, and *Bernadette Foley;* and for the Washington State Psychiatric Association by *David A. Summers.*

David B. Robbins filed a brief for the Association for the Treatment of Sexual Abusers as *amicus curiae.*

[1] Subsequent to Hendricks' commitment, the Kansas Legislature amended the Act in ways not relevant to this action. See, *e. g.,* Kan. Stat.

ready had a statute addressing the involuntary commitment of those defined as "mentally ill," the legislature determined that existing civil commitment procedures were inadequate to confront the risks presented by "sexually violent predators." In the Act's preamble, the legislature explained:

> "[A] small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the [general involuntary civil commitment statute] .... In contrast to persons appropriate for civil commitment under the [general involuntary civil commitment statute], sexually violent predators generally have anti-social personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sexually violent predators' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedure . . . is inadequate to address the risk these sexually violent predators pose to society. The legislature further finds that the prognosis for rehabilitating sexually violent predators in a prison setting is poor, the treatment needs of this population are very long term and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the [general involuntary civil commitment statute]." Kan. Stat. Ann. § 59–29a01 (1994).

As a result, the legislature found it necessary to establish "a civil commitment procedure for the long-term care and

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Ann. § 59–29a03 (Supp. 1996) (changing notification period from 60 to 90 days); § 59–29a04 (requiring state attorney general to initiate commitment proceedings).

treatment of the sexually violent predator." *Ibid.* The Act defined a "sexually violent predator" as:

> "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence." § 59–29a02(a).

A "mental abnormality" was defined, in turn, as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." § 59–29a02(b).

As originally structured, the Act's civil commitment procedures pertained to: (1) a presently confined person who, like Hendricks, "has been convicted of a sexually violent offense" and is scheduled for release; (2) a person who has been "charged with a sexually violent offense" but has been found incompetent to stand trial; (3) a person who has been found "not guilty by reason of insanity of a sexually violent offense"; and (4) a person found "not guilty" of a sexually violent offense because of a mental disease or defect. § 59–29a03(a), § 22–3221 (1995).

The initial version of the Act, as applied to a currently confined person such as Hendricks, was designed to initiate a specific series of procedures. The custodial agency was required to notify the local prosecutor 60 days before the anticipated release of a person who might have met the Act's criteria. § 59–29a03. The prosecutor was then obligated, within 45 days, to decide whether to file a petition in state court seeking the person's involuntary commitment. § 59–29a04. If such a petition were filed, the court was to determine whether "probable cause" existed to support a finding that the person was a "sexually violent predator" and thus eligible for civil commitment. Upon such a determination, transfer of the individual to a secure facility for professional evaluation would occur. § 59–29a05. After that evaluation, a trial would be held to determine beyond a reasonable doubt whether the individual was a sexually violent predator. If that determination were made, the person would then be transferred to the custody of the Secretary of Social and Rehabilitation Services (Secretary) for "control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large." § 59–29a07(a).

In addition to placing the burden of proof upon the State, the Act afforded the individual a number of other procedural safeguards. In the case of an indigent person, the State was required to provide, at public expense, the assistance of counsel and an examination by mental health care professionals. § 59–29a06. The individual also received the right to present and cross-examine witnesses, and the opportunity to review documentary evidence presented by the State. § 59–29a07.

Once an individual was confined, the Act required that "[t]he involuntary detention or commitment . . . shall conform to constitutional requirements for care and treatment." § 59–29a09. Confined persons were afforded three different avenues of review: First, the committing court was obligated to conduct an annual review to determine whether continued detention was warranted. § 59–29a08. Second, the Secretary was permitted, at any time, to decide that the confined individual's condition had so changed that release was appropriate, and could then authorize the person to petition for release. § 59–29a10. Finally, even without the Secretary's permission, the confined person could at any time file a release petition. § 59–29a11. If the court found that the State could no longer satisfy its burden under the initial commitment standard, the individual would be freed from confinement.

B

In 1984, Hendricks was convicted of taking "indecent liberties" with two 13-year-old boys. After serving nearly 10 years of his sentence, he was slated for release to a halfway house. Shortly before his scheduled release, however, the State filed a petition in state court seeking Hendricks' civil confinement as a sexually violent predator. On August 19, 1994, Hendricks appeared before the court with counsel and moved to dismiss the petition on the grounds that the Act violated various federal constitutional provisions. Although the court reserved ruling on the Act's constitutionality, it concluded that there was probable cause to support a finding that Hendricks was a sexually violent predator, and therefore ordered that he be evaluated at the Larned State Security Hospital.

Hendricks subsequently requested a jury trial to determine whether he qualified as a sexually violent predator. During that trial, Hendricks' own testimony revealed a chilling history of repeated child sexual molestation and abuse, beginning in 1955 when he exposed his genitals to two young girls. At that time, he pleaded guilty to indecent exposure. Then, in 1957, he was convicted of lewdness involving a young girl and received a brief jail sentence. In 1960, he molested two young boys while he worked for a carnival. After serving two years in prison for that offense, he was paroled, only to be rearrested for molesting a 7-year-old girl. Attempts were made to treat him for his sexual deviance, and in 1965 he was considered "safe to be at large," and was discharged from a state psychiatric hospital. App. 139–144.

Shortly thereafter, however, Hendricks sexually assaulted another young boy and girl—he performed oral sex on the 8-year-old girl and fondled the 11-year-old boy. He was again imprisoned in 1967, but refused to participate in a sex offender treatment program, and thus remained incarcerated until his parole in 1972. Diagnosed as a pedophile, Hendricks entered into, but then abandoned, a treatment program. He testified that despite having received professional help for his pedophilia, he continued to harbor sexual desires for children. Indeed, soon after his 1972 parole, Hendricks began to abuse his own stepdaughter and stepson. He forced the children to engage in sexual activity with him over a period of approximately four years. Then, as noted above, Hendricks was convicted of "taking indecent liberties" with two adolescent boys after he attempted to fondle them. As a result of that conviction, he was once again imprisoned, and was serving that sentence when he reached his conditional release date in September 1994.

Hendricks admitted that he had repeatedly abused children whenever he was not confined. He explained that when he "get[s] stressed out," he "can't control the urge" to molest children. *Id.*, at 172. Although Hendricks recognized that his behavior harms children, and he hoped he would not sexually molest children again, he stated that the only sure way he could keep from sexually abusing children in the future was "to die." *Id.*, at 190. Hendricks readily agreed with the state physician's diagnosis that he suffers from pedophilia and that he is not cured of the condition; indeed, he told the physician that "treatment is bull——." *Id.*, at 153, 190.[2]

The jury unanimously found beyond a reasonable doubt that Hendricks was a sexually violent predator. The trial court subsequently determined, as a matter of state law, that pedophilia qualifies as a "mental abnormality" as defined by the Act, and thus ordered Hendricks committed to the Secretary's custody.

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[2] In addition to Hendricks' own testimony, the jury heard from Hendricks' stepdaughter and stepson, who recounted the events surrounding their repeated sexual abuse at Hendricks' hands. App. 194–212. One of the girls to whom Hendricks exposed himself in 1955 testified as well. *Id.*, at 191–194. The State also presented testimony from Lester Lee, a licensed clinical social worker who specialized in treating male sexual offenders, and Dr. Charles Befort, the chief psychologist at Larned State Hospital. Lee testified that Hendricks had a diagnosis of personality trait disturbance, passive-aggressive personality, and pedophilia. *Id.*, at 219–220. Dr. Befort testified that Hendricks suffered from pedophilia and is likely to commit sexual offenses against children in the future if not confined. *Id.*, at 247–248. He further opined that pedophilia qualifies as a "mental abnormality" within the Act's definition of that term. *Id.*, at 263–264. Finally, Hendricks offered testimony from Dr. William S. Logan, a forensic psychiatrist, who stated that it was not possible to predict with any degree of accuracy the future dangerousness of a sex offender. *Id.*, at 328–331.

Hendricks appealed, claiming, among other things, that application of the Act to him violated the Federal Constitution's Due Process, Double Jeopardy, and *Ex Post Facto* Clauses. The Kansas Supreme Court accepted Hendricks' due process claim. 259 Kan., at 261, 912 P. 2d, at 138. The court declared that in order to commit a person involuntarily in a civil proceeding, a State is required by "substantive" due process to prove by clear and convincing evidence that the person is both (1) mentally ill, and (2) a danger to himself or to others. *Id.*, at 259, 912 P. 2d, at 137. The court then determined that the Act's definition of "mental abnormality" did not satisfy what it perceived to be this Court's "mental illness" requirement in the civil commitment context. As a result, the court held that "the Act violates Hendricks' substantive due process rights." *Id.*, at 261, 912 P. 2d, at 138.

The majority did not address Hendricks' *ex post facto* or double jeopardy claims. The dissent, however, considered each of Hendricks' constitutional arguments and rejected them. *Id.*, at 264–294, 912 P. 2d, 140–156 (Larson, J., dissenting).

II

A

Kansas argues that the Act's definition of "mental abnormality" satisfies "substantive" due process requirements. We agree. Although freedom from physical restraint "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action," *Foucha* v. *Louisiana*, 504 U. S. 71, 80 (1992), that liberty interest is not absolute. The Court has recognized that an individual's constitutionally protected interest in avoiding physical restraint may be overridden even in the civil context:

> "[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not

> import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members." *Jacobson* v. *Massachusetts,* 197 U. S. 11, 26 (1905).

Accordingly, States have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety. See, *e. g.,* 1788 N. Y. Laws, ch. 31 (Feb. 9, 1788) (permitting confinement of the "furiously mad"); see also A. Deutsch, The Mentally Ill in America (1949) (tracing history of civil commitment in the 18th and 19th centuries); G. Grob, Mental Institutions in America: Social Policy to 1875 (1973) (discussing colonial and early American civil commitment statutes). We have consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards. See *Foucha, supra,* at 80; *Addington* v. *Texas,* 441 U. S. 418, 426–427 (1979). It thus cannot be said that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty. Cf. *id.,* at 426.

The challenged Act unambiguously requires a finding of dangerousness either to one's self or to others as a prerequisite to involuntary confinement. Commitment proceedings can be initiated only when a person "has been convicted of or charged with a sexually violent offense," and "suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence." Kan. Stat. Ann. § 59–29a02(a) (1994). The statute thus requires proof of more than a mere predisposition to violence; rather, it requires evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated. As we have recognized, "[p]revious instances of violent behavior are an important indicator of future violent tendencies." *Heller* v. *Doe,* 509 U. S. 312, 323 (1993); see also *Schall* v. *Martin,* 467 U. S. 253, 278 (1984) (explaining that "from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct").

A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a "mental illness" or "mental abnormality." See, *e. g., Heller, supra,* at 314–315 (Kentucky statute permitting commitment of "mentally retarded" or "mentally ill" and dangerous individual); *Allen* v. *Illinois,* 478 U. S. 364, 366 (1986) (Illinois statute permitting commitment of "mentally ill" and dangerous individual); *Minnesota ex rel. Pearson* v. *Probate Court of Ramsey Cty.,* 309 U. S. 270, 271–272 (1940) (Minnesota statute permitting commitment of dangerous individual with "psychopathic personality"). These added statutory requirements serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control. The Kansas Act is plainly of a kind with these other civil commitment statutes: It requires a finding of future dangerousness, and then links that finding to the existence of a "mental abnormality" or "personality disorder" that makes it difficult, if not impossible, for the person to control his dangerous behavior. Kan. Stat. Ann. § 59–29a02(b) (1994). The precommitment requirement of a "mental abnormality" or "personality disorder" is consistent with the requirements of these other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness.

Hendricks nonetheless argues that our earlier cases dictate a finding of "mental illness" as a prerequisite for civil commitment, citing *Foucha* and *Addington.* He then asserts that a "mental abnormality" is *not* equivalent to a "mental illness" because it is a term coined by the Kansas Legislature, rather than by the psychiatric community. Contrary to Hendricks' assertion, the term "mental illness" is devoid of any talismanic significance. Not only do "psychiatrists disagree widely and frequently on what constitutes mental illness," *Ake* v. *Oklahoma,* 470 U. S. 68, 81 (1985), but the Court itself has used a variety of expressions to describe the mental condition of those properly subject to civil confinement. See, *e. g., Addington, supra,* at 425–426 (using the terms "emotionally disturbed" and "mentally ill"); *Jackson* v. *Indiana,* 406 U. S. 715, 732, 737 (1972) (using the terms "incompetency" and "insanity"); cf. *Foucha,* 504 U. S., at 88 (O'Connor, J., concurring in part and concurring in judgment) (acknowledging State's authority to commit a person when there is "some medical justification for doing so").

Indeed, we have never required state legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance. Cf. *Jones* v. *United States,* 463 U. S. 354, 365, n. 13 (1983). As a consequence, the States have, over the years, developed numerous specialized terms to define mental health concepts. Often, those definitions do not fit precisely with the definitions employed by the medical community. The legal definitions of "insanity" and "competency," for example, vary substantially from their psychiatric counterparts. See, *e. g.,* Gerard, The Usefulness of the Medical Model to the Legal System, 39 Rutgers L. Rev. 377, 391–394 (1987) (discussing differing purposes of legal system and the medical profession in recognizing mental illness). Legal definitions, however, which must "take into account such issues as individual responsibility . . . and competency," need not mirror those advanced by the medical profession. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders xxiii, xxvii (4th ed. 1994).

To the extent that the civil commitment statutes we have considered set forth criteria relating to an individual's inability to control his dangerousness, the Kansas Act sets forth comparable criteria and Hendricks' condition doubtless satisfies those criteria. The mental health professionals who evaluated Hendricks diagnosed him as suffering from pedophilia, a condition the psychiatric profession itself classifies as a serious mental disorder. See, *e. g., id.*, at 524–525, 527–528; 1 American Psychiatric Association, Treatments of Psychiatric Disorders 617–633 (1989); Abel & Rouleau, Male Sex Offenders, in Handbook of Outpatient Treatment of Adults 271 (M. Thase, B. Edelstein, & M. Hersen eds. 1990).[3] Hendricks even conceded that, when he becomes "stressed out," he cannot "control the urge" to molest children. App. 172. This admitted lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings. Hendricks' diagnosis as a pedophile, which qualifies as a "mental abnormality" under the Act, thus plainly suffices for due process purposes.

B

We granted Hendricks' cross-petition to determine whether the Act violates the Constitution's double jeopardy prohibition or its ban on *ex post facto* lawmaking. The thrust of Hendricks' argument is that the Act establishes criminal proceedings; hence confinement under it necessarily constitutes punishment. He contends that where, as here, newly enacted "punishment" is predicated upon past conduct for which he has already been convicted and forced to serve a prison sentence, the Constitution's Double Jeopardy and *Ex Post Facto* Clauses are violated. We are unpersuaded by Hendricks' argument that Kansas has established criminal proceedings.

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[3] We recognize, of course, that psychiatric professionals are not in complete harmony in casting pedophilia, or paraphilias in general, as "mental illnesses." Compare Brief for American Psychiatric Association as *Amicus Curiae* 26 with Brief for Menninger Foundation et al. as *Amici Curiae* 22–25. These disagreements, however, do not tie the State's hands in setting the bounds of its civil commitment laws. In fact, it is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting such statutes. Cf. *Jones* v. *United States*, 463 U. S. 354, 365, n. 13 (1983). As we have explained regarding congressional enactments, when a legislature "undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation." *Id.*, at 370 (internal quotation marks and citation omitted).

The categorization of a particular proceeding as civil or criminal "is first of all a question of statutory construction." *Allen,* 478 U. S., at 368. We must initially ascertain whether the legislature meant the statute to establish "civil" proceedings. If so, we ordinarily defer to the legislature's stated intent. Here, Kansas' objective to create a civil proceeding is evidenced by its placement of the Act within the Kansas probate code, Kan. Stat. Ann., Art. 29 (1994) ("Care and Treatment for Mentally Ill Persons"), instead of the criminal code, as well as its description of the Act as creating a "*civil commitment procedure,*" § 59–29a01 (emphasis added). Nothing on the face of the statute suggests that the legislature sought to create anything other than a civil commitment scheme designed to protect the public from harm.

Although we recognize that a "civil label is not always dispositive," *Allen, supra,* at 369, we will reject the legislature's manifest intent only where a party challenging the statute provides "the clearest proof" that "the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention" to deem it "civil," *United States* v. *Ward,* 448 U. S. 242, 248–249 (1980). In those limited circumstances, we will consider the statute to have established criminal proceedings for constitutional purposes. Hendricks, however, has failed to satisfy this heavy burden.

As a threshold matter, commitment under the Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence. The Act's purpose is not retributive because it does not affix culpability for prior criminal conduct. Instead, such conduct is used solely for evidentiary purposes, either to demonstrate that a "mental abnormality" exists or to support a finding of future dangerousness. We have previously concluded that an Illinois statute was nonpunitive even though it was triggered by the commission of a sexual assault, explaining that evidence of the prior criminal conduct was "received not to punish past misdeeds, but primarily to show the accused's mental condition and to predict future behavior." *Allen, supra,* at 371. In addition, the Kansas Act does not make a criminal conviction a prerequisite for commitment—persons absolved of criminal responsibility may nonetheless be subject to confinement under the Act. See Kan. Stat. Ann. § 59–29a03(a) (1994). An absence of the necessary criminal responsibility suggests that the State is not seeking retribution for a past misdeed. Thus, the fact that the Act may be "tied to criminal activity" is "insufficient to render the statut[e] punitive." *United States* v. *Ursery,* 518 U. S. 267 (1996).

Moreover, unlike a criminal statute, no finding of scienter is required to commit an individual who is found to be a sexually violent predator; instead, the commitment determination is made based on a "mental abnormality" or "personality disorder" rather than on one's criminal intent. The existence of a scienter requirement is customarily an important element in distinguishing criminal from civil statutes. See *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, 168 (1963). The absence of such a requirement here is evidence that confinement under the statute is not intended to be retributive.

Nor can it be said that the legislature intended the Act to function as a deterrent. Those persons committed under the Act are, by definition, suffering from a "mental abnormality" or a "personality disorder" that prevents them from exercising adequate control over their behavior. Such persons are therefore unlikely to be deterred by the threat of confinement. And the conditions surrounding that confinement do not suggest a punitive purpose on the State's part. The State has represented that an individual confined under the Act is not subject to the more restrictive conditions placed on state prisoners, but instead experiences essentially the same conditions as any involuntarily committed patient in the state mental institution. App. 50–56, 59–60. Because none of the parties argues that people institutionalized under the Kansas general civil commitment statute are subject to punitive conditions, even though they may be involuntarily confined, it is difficult to conclude that persons confined under this Act are being "punished."

Although the civil commitment scheme at issue here does involve an affirmative restraint, "the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment." *United States* v. *Salerno*, 481 U. S. 739, 746 (1987). The State may take measures to restrict the freedom of the dangerously mentally ill. This is a legitimate nonpunitive governmental objective and has been historically so regarded. Cf. *id.*, at 747. The Court has, in fact, cited the confinement of "mentally unstable individuals who present a danger to the public" as one classic example of nonpunitive detention. *Id.*, at 748–749. If detention for the purpose of protecting the community from harm *necessarily* constituted punishment, then all involuntary civil commitments would have to be considered punishment. But we have never so held.

Hendricks focuses on his confinement's potentially indefinite duration as evidence of the State's punitive intent. That focus, however, is misplaced. Far from any punitive objective, the confinement's duration is instead linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others. Cf. *Jones*, 463 U. S., at 368 (noting with approval that "because it is impossible to predict how long it will take for any given individual to recover [from insanity]—or indeed whether he will ever recover—Congress has chosen . . . to leave the length of commitment indeterminate, subject to periodic review of the patient's suitability for release"). If, at any time, the confined person is adjudged "safe to be at large," he is statutorily entitled to immediate release. Kan. Stat. Ann. § 59–29a07 (1994).

Furthermore, commitment under the Act is only *potentially* indefinite. The maximum amount of time an individual can be incapacitated pursuant to a single judicial proceeding is one year. § 59–29a08. If Kansas seeks to continue the detention beyond that year, a court must once again determine beyond a reasonable doubt that the detainee satisfies the same standards as required for the initial confinement. *Ibid.* This requirement again demonstrates that Kansas does not intend an individual committed pursuant to the Act to remain confined any longer than he suffers from a mental abnormality rendering him unable to control his dangerousness.

Hendricks next contends that the State's use of procedural safeguards traditionally found in criminal trials makes the proceedings here criminal rather than civil. In *Allen,* we confronted a similar argument. There, the petitioner "place[d] great reliance on the fact that proceedings under the Act are accompanied by procedural safeguards usually found in criminal trials" to argue that the proceedings were civil in name only. 478 U. S., at 371. We rejected that argument, however, explaining that the State's decision "to provide some of the safeguards applicable in criminal trials cannot itself turn these proceedings into criminal prosecutions." *Id.,* at 372. The numerous procedural and evidentiary protections afforded here demonstrate that the Kansas Legislature has taken great care to confine only a narrow class of particularly dangerous individuals, and then only after meeting the strictest procedural standards. That Kansas chose to afford such procedural protections does not transform a civil commitment proceeding into a criminal prosecution.

Finally, Hendricks argues that the Act is necessarily punitive because it fails to offer any legitimate "treatment." Without such treatment, Hendricks asserts, confinement under the Act amounts to little more than disguised punishment. Hendricks' argument assumes that treatment for his condition is available, but that the State has failed (or refused) to provide it. The Kansas Supreme Court, however, apparently rejected this assumption, explaining:

> "It is clear that the overriding concern of the legislature is to continue the segregation of sexually violent offenders from the public. Treatment with the goal of reintegrating them into society is incidental, at best. The record reflects that treatment for sexually violent predators is all but nonexistent. The legislature concedes that sexually violent predators are not amenable to treatment under [the existing Kansas involuntary commitment statute]. If there is nothing to treat under [that statute], then there is no mental illness. In that light, the provisions of the Act for treatment appear somewhat disingenuous." 259 Kan., at 258, 912 P. 2d, at 136.

It is possible to read this passage as a determination that Hendricks' condition was *untreatable* under the existing Kansas civil commitment statute, and thus the Act's sole purpose was incapacitation. Absent a treatable mental illness, the Kansas court concluded, Hendricks could not be detained against his will.

Accepting the Kansas court's apparent determination that treatment is not possible for this category of individuals does not obligate us to adopt its legal conclusions. We have already observed that, under the appropriate circumstances and when accompanied by proper procedures, incapacitation may be a legitimate end of the civil law. See *Allen, supra,* at 373; *Salerno,* 481 U. S., at 748–749. Accordingly, the Kansas court's determination that the Act's "overriding concern" was the continued "segregation of sexually violent offenders" is consistent with our conclusion that the Act establishes civil proceedings, 259 Kan., at 258, 912 P. 2d, at 136, especially when that concern is coupled with the State's ancillary goal of providing treatment to those offenders, if such is possible. While we have upheld state civil commitment statutes that aim both to incapacitate and to treat, see *Allen, supra,* we have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others. A State could hardly be seen as furthering a "punitive" purpose by involuntarily confining persons afflicted with an untreatable, highly contagious disease. Accord, *Compagnie Francaise de Navigation a Vapeur* v. *Louisiana Bd. of Health,* 186 U. S. 380 (1902) (permitting involuntary quarantine of persons suffering from communicable diseases). Similarly, it would be of little value to require treatment as a precondition for civil confinement of the dangerously insane when no acceptable treatment existed. To conclude otherwise would obligate a State to release certain confined individuals who were both mentally ill and dangerous simply because they could not be successfully treated for their afflictions. Cf. *Greenwood* v. *United States,* 350 U. S. 366, 375 (1956) ("The fact that at present there may be little likelihood of recovery does not defeat federal power to make this initial commitment of the petitioner"); *O'Connor* v. *Donaldson,* 422 U. S. 563, 584 (1975) (Burger, C. J., concurring) ("[I]t remains a stubborn fact that there are many forms of mental illness which are not understood, some which are untreatable in the sense that no effective therapy has yet been discovered for them, and that rates of 'cure' are generally low").

Alternatively, the Kansas Supreme Court's opinion can be read to conclude that Hendricks' condition is treatable, but that treatment was not the State's "overriding concern," and that no treatment was being provided (at least at the time Hendricks was committed). 259 Kan., at 258, 912 P. 2d, at 136. See also *ibid.* ("It is clear that the primary objective of the Act is to continue incarceration and not to provide treatment"). Even if we accept this determination that the provision of treatment was not the Kansas Legislature's "overriding" or "primary" purpose in passing the Act, this does not rule out the possibility that an ancillary purpose of the Act was to provide treatment, and it does not require us to conclude that the Act is punitive. Indeed, critical language in the Act itself demonstrates that the Secretary, under whose custody sexually violent predators are committed, has an obligation to provide treatment to individuals like Hendricks. § 59–29a07(a) ("If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the secretary of social and rehabilitation services for *control, care and treatment* until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large" (emphasis added)). Other of the Act's sections echo this obligation to provide treatment for committed persons. See, *e. g.*, § 59–29a01 (establishing civil commitment procedure "for the long-term care and treatment of the sexually violent predator"); § 59–29a09 (requiring the confinement to "conform to constitutional requirements for care and treatment"). Thus, as in *Allen*, "the State has a statutory obligation to provide 'care and treatment for [persons adjudged sexually dangerous] designed to effect recovery,'" 478 U. S., at 369 (quoting Ill. Rev. Stat., ch. 38, ¶ 105–8 (1985)), and we may therefore conclude that "the State has . . . provided for the treatment of those it commits," 478 U. S., at 370.

Although the treatment program initially offered Hendricks may have seemed somewhat meager, it must be remembered that he was the first person committed under the

Act. That the State did not have all of its treatment procedures in place is thus not surprising. What is significant, however, is that Hendricks was placed under the supervision of the Kansas Department of Health and Social and Rehabilitative Services, housed in a unit segregated from the general prison population and operated not by employees of the Department of Corrections, but by other trained individuals.[4] And, before this Court, Kansas declared "[a]bsolutely" that persons committed under the Act are now receiving in the neighborhood of "31-½ hours of treatment per week." Tr. of Oral Arg. 14–15, 16.[5]

Where the State has "disavowed any punitive intent"; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent. We therefore hold that the Act does not establish criminal proceedings and that involuntary confinement pursuant to the Act is not punitive. Our conclusion that the Act is nonpunitive thus removes an essential prerequisite for both Hendricks' double jeopardy and *ex post facto* claims.

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[4] We have explained that the States enjoy wide latitude in developing treatment regimens. *Youngberg* v. *Romeo*, 457 U. S. 307, 317 (1982) (observing that the State "has considerable discretion in determining the nature and scope of its responsibilities"). In *Allen* v. *Illinois*, 478 U. S. 364 (1986), for example, we concluded that "the State serves its purpose of treating rather than punishing sexually dangerous persons by committing them to an institution expressly designed to provide psychiatric care and treatment." *Id.*, at 373 (emphasis deleted). By this measure, Kansas has doubtless satisfied its obligation to provide available treatment.

[5] Indeed, we have been informed that in an August 28, 1995, hearing on Hendricks' petition for state habeas corpus relief, the trial court, over admittedly conflicting testimony, ruled: "[T]he allegation that no treatment is being provided to any of the petitioners or other persons committed to the program designated as a sexual predator treatment program is not true. I find that they are receiving treatment." App. 453–454. Thus, to the extent that treatment is available for Hendricks' condition, the State now appears to be providing it. By furnishing such treatment, the Kansas Legislature has indicated that treatment, if possible, is at least an ancillary goal of the Act, which easily satisfies any test for determining that the Act is not punitive.

1

The Double Jeopardy Clause provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." Although generally understood to preclude a second prosecution for the same offense, the Court has also interpreted this prohibition to prevent the State from "punishing twice, or attempting a second time to punish criminally, for the same offense." *Witte* v. *United States,* 515 U. S. 389, 396 (1995) (emphasis and internal quotation marks omitted). Hendricks argues that, as applied to him, the Act violates double jeopardy principles because his confinement under the Act, imposed after a conviction and a term of incarceration, amounted to both a second prosecution and a second punishment for the same offense. We disagree.

Because we have determined that the Kansas Act is civil in nature, initiation of its commitment proceedings does not constitute a second prosecution. Cf. *Jones* v. *United States,* 463 U. S. 354 (1983) (permitting involuntary civil commitment after verdict of not guilty by reason of insanity). Moreover, as commitment under the Act is not tantamount to "punishment," Hendricks' involuntary detention does not violate the Double Jeopardy Clause, even though that confinement may follow a prison term. Indeed, in *Baxstrom* v. *Herold,* 383 U. S. 107 (1966), we expressly recognized that civil commitment could follow the expiration of a prison term without offending double jeopardy principles. We reasoned that "there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments." *Id.*, at 111–112. If an individual otherwise meets the requirements for involuntary civil commitment, the State is under no obligation to release that individual simply because the detention would follow a period of incarceration.

Hendricks also argues that even if the Act survives the "multiple punishments" test, it nevertheless fails the "same elements" test of *Blockburger* v. *United States*, 284 U. S. 299 (1932). Under *Blockburger*, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.*, at 304. The *Blockburger* test, however, simply does not apply outside of the successive prosecution context. A proceeding under the Act does not define an "offense," the elements of which can be compared to the elements of an offense for which the person may previously have been convicted. Nor does the Act make the commission of a specified "offense" the basis for invoking the commitment proceedings. Instead, it uses a prior conviction (or previously charged conduct) for evidentiary purposes to determine whether a person suffers from a "mental abnormality" or "personality disorder" and also poses a threat to the public. Accordingly, we are unpersuaded by Hendricks' novel application of the *Blockburger* test and conclude that the Act does not violate the Double Jeopardy Clause.

2

Hendricks' *ex post facto* claim is similarly flawed. The *Ex Post Facto* Clause, which "'forbids the application of any new punitive measure to a crime already consummated,'" has been interpreted to pertain exclusively to penal statutes. *California Dept. of Corrections* v. *Morales*, 514 U. S. 499, 505 (1995) (quoting *Lindsey* v. *Washington*, 301 U. S. 397, 401 (1937)). As we have previously determined, the Act does not impose punishment; thus, its application does not raise *ex post facto* concerns. Moreover, the Act clearly does not have retroactive effect. Rather, the Act permits involuntary confinement based upon a determination that the person *currently* both suffers from a "mental abnormality" or "personality disorder" and is likely to pose a future danger to the public. To the extent that past behavior is taken into account, it is used, as noted above, solely for evidentiary purposes. Because the Act does not criminalize conduct legal before its enactment, nor deprive Hendricks of any defense that was available to him at the time of his crimes, the Act does not violate the *Ex Post Facto* Clause.

III

We hold that the Kansas Sexually Violent Predator Act comports with due process requirements and neither runs afoul of double jeopardy principles nor constitutes an exercise in impermissible *ex post facto* lawmaking. Accordingly, the judgment of the Kansas Supreme Court is reversed.

It is so ordered.

JUSTICE KENNEDY, concurring.

I join the opinion of the Court in full and add these additional comments.

Though other issues were argued to us, as the action has matured it turns on whether the Kansas statute is an *ex post facto* law. A law enacted after commission of the offense and which punishes the offense by extending the term of confinement is a textbook example of an *ex post facto* law. If the object or purpose of the Kansas law had been to provide treatment but the treatment provisions were adopted as a sham or mere pretext, there would have been an indication of the forbidden purpose to punish. The Court's opinion gives a full and complete explanation why an *ex post facto* challenge based on this contention cannot succeed in the action before us. All this, however, concerns Hendricks alone. My brief, further comment is to caution against dangers inherent when a civil confinement law is used in conjunction with the criminal process, whether or not the law is given retroactive application.

It seems the dissent, too, would validate the Kansas statute as to persons who committed the crime after its enactment, and it might even validate the statute as to Hendricks, assuming a reasonable level of treatment. As all Members of the Court seem to agree, then, the power of the State to confine persons who, by reason of a mental disease or mental abnormality, constitute a real, continuing, and serious danger to society is well established. *Addington* v. *Texas*, 441 U. S. 418, 426–427 (1979). Confinement of such individuals is permitted even if it is pursuant to a statute enacted after the crime has been committed and the offender has begun serving, or has all but completed serving, a penal sentence, provided there is no object or purpose to punish. See *Baxstrom* v. *Herold*, 383 U. S. 107, 111–112 (1966). The Kansas law, with its attendant protections, including yearly review and review at any time at the instance of the person confined, is within this pattern and tradition of civil confinement. In this action, the mental abnormality—pedophilia—is at least described in the DSM–IV. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 524–525, 527–528 (4th ed. 1994).

Notwithstanding its civil attributes, the practical effect of the Kansas law may be to impose confinement for life. At this stage of medical knowledge, although future treatments cannot be predicted, psychiatrists or other professionals engaged in treating pedophilia may be reluctant to find measurable success in treatment even after a long period and may be unable to predict that no serious danger will come from release of the detainee.

A common response to this may be, "A life term is exactly what the sentence should have been anyway," or, in the words of a Kansas task force member, "SO BE IT." Testimony of Jim Blaufuss, App. 503. The point, however, is not how long Hendricks and others like him should serve a criminal sentence. With his criminal record, after all, a life term may well have been the only sentence appropriate to protect society and vindicate the wrong. The concern instead is whether it is the criminal system or the civil system which should make the decision in the first place. If the civil system is used simply to impose punishment after the State makes an improvident plea bargain on the criminal side, then it is not performing its proper function. These concerns persist whether the civil confinement statute is put on the books before or after the offense. We should bear in mind that while incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone.

On the record before us, the Kansas civil statute conforms to our precedents. If, however, civil confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.

JUSTICE BREYER, with whom JUSTICE STEVENS and JUSTICE SOUTER join, and with whom JUSTICE GINSBURG joins as to Parts II and III, dissenting.

I agree with the majority that the Kansas Sexually Violent Predator Act's "definition of 'mental abnormality'" satisfies the "substantive" requirements of the Due Process Clause. *Ante*, at 356. Kansas, however, concedes that Hendricks' condition is treatable; yet the Act did not provide Hendricks (or others like him) with any treatment until after his release date from prison and only inadequate treatment thereafter. These, and certain other, special features of the Act convince me that it was not simply an effort to commit Hendricks civilly, but rather an effort to inflict further punishment upon him. The *Ex Post Facto* Clause therefore prohibits the Act's application to Hendricks, who committed his crimes prior to its enactment.

I

I begin with the area of agreement. This Court has held that the civil commitment of a "mentally ill" and "dangerous" person does not automatically violate the Due Process Clause provided that the commitment takes place pursuant to proper procedures and evidentiary standards. See *Foucha* v. *Louisiana,* 504 U. S. 71, 80 (1992); *Addington* v. *Texas,* 441 U. S. 418, 426–427 (1979). The Kansas Supreme Court, however, held that the Due Process Clause forbids application of the Act to Hendricks for "substantive" reasons, *i. e.,* irrespective of the procedures or evidentiary standards used. The court reasoned that Kansas had not satisfied the "mentally ill" requirement of the Due Process Clause because Hendricks was not "mentally ill." *In re Hendricks,* 259 Kan. 246, 260–261, 912 P. 2d 129, 137–138 (1996). Moreover, Kansas had not satisfied what the court believed was an additional "substantive due process" requirement, namely, the provision of treatment. *Id.,* at 257–258, 912 P. 2d, at 136. I shall consider each of these matters briefly.

A

In my view, the Due Process Clause permits Kansas to classify Hendricks as a mentally ill and dangerous person for civil commitment purposes. *Allen* v. *Illinois,* 478 U. S. 364, 370–371, 373–375 (1986). I agree with the majority that the Constitution gives States a degree of leeway in making this kind of determination. *Ante,* at 359; *Foucha, supra,* at 87 (O'CONNOR, J., concurring in part and concurring in judgment); *Jones* v. *United States,* 463 U. S. 354, 365, n. 13 (1983). But, because I do not subscribe to all of its reasoning, I shall set forth three sets of circumstances that, taken together, convince me that Kansas has acted within the limits that the Due Process Clause substantively sets.

First, the psychiatric profession itself classifies the kind of problem from which Hendricks suffers as a serious mental disorder. *E. g.*, American Psychiatric Assn., Diagnostic and Statistical Manual of Mental Disorders 524–525, 527–528 (4th ed. 1994) (describing range of paraphilias and discussing how stress aggravates pedophilic behavior); Abel & Rouleau, Male Sex Offenders, in Handbook of Outpatient Treatment of Adults 271 (M. Thase, B. Edelstein, & M. Hersen eds. 1990). I concede that professionals also debate whether or not this disorder should be called a mental "illness." See R. Slovenko, Psychiatry and Criminal Culpability 57 (1995) (citing testimony that paraphilias are not mental illnesses); Schopp & Sturgis, Sexual Predators and Legal Mental Illness for Civil Commitment, 13 Behav. Sci. & The Law 437, 451–452 (1995) (same). Compare Brief for American Psychiatric Association as *Amicus Curiae* 26 (mental illness requirement not satisfied) with Brief for Menninger Clinic et al. as *Amici Curiae* 22–25 (requirement is satisfied). But the very presence and vigor of this debate is important. The Constitution permits a State to follow one reasonable professional view, while rejecting another. See *Addington* v. *Texas, supra,* at 431. The psychiatric debate, therefore, helps to inform the law by setting the bounds of what is reasonable, but it cannot here decide just how States must write their laws within those bounds. See *Jones, supra,* at 365, n. 13.

Second, Hendricks' abnormality does not consist simply of a long course of antisocial behavior, but rather it includes a specific, serious, and highly unusual inability to control his actions. (For example, Hendricks testified that, when he gets "stressed out," he cannot "control the urge" to molest children, see *ante,* at 355.) The law traditionally has considered this kind of abnormality akin to insanity for purposes of confinement. See, *e. g., Minnesota ex rel. Pearson* v. *Probate Court of Ramsey Cty.,* 309 U. S. 270, 274 (1940) (upholding against a due process challenge the civil confinement of a dangerous person where the danger flowed from an " 'utter lack of power to control . . . sexual impulses' ") (quoting *State ex rel. Pearson* v. *Probate Court of Ramsey Cty.*, 205 Minn. 545, 555, 287 N. W. 297, 302 (1939)); 1788 N. Y. Laws, ch. 31 (permitting confinement of those who are "furiously mad"); *In re Oakes*, 8 Law Rep. 122, 125 (Mass. 1845) (Shaw, C. J.); A. Deutsch, The Mentally Ill in America 419–420 (1949) (tracing history of commitment of furiously mad people in 18th and 19th centuries); Dershowitz, The Origins of Preventative Confinement in Anglo-American Law—Part II: The American Experience, 43 U. Cin. L. Rev. 781 (1974). Indeed, the notion of an "irresistible impulse" often has helped to shape criminal law's insanity defense and to inform the related recommendations of legal experts as they seek to translate the insights of mental health professionals into workable legal rules. See also American Law Institute, Model Penal Code § 4.01 (insanity defense, in part, rests on inability "to conform . . . conduct to the requirements of law"); A. Goldstein, The Insanity Defense 67–79 (1967) (describing "irresistible impulse" test).

Third, Hendricks' mental abnormality also makes him dangerous. Hendricks "has been convicted of . . . a sexually violent offense," and a jury found that he "suffers from a mental abnormality . . . which makes" him "likely to engage" in similar "acts of sexual violence" in the future. Kan. Stat. Ann. §§ 59–29a02, 59–29a03 (1994). The evidence at trial favored the State. Dr. Befort, for example, explained why Hendricks was likely to commit further acts of sexual violence if released. See, *e. g.*, App. 248–254. And Hendricks' own testimony about what happens when he gets "stressed out" confirmed Dr. Befort's diagnosis.

Because (1) many mental health professionals consider pedophilia a serious mental disorder; and (2) Hendricks suffers from a classic case of irresistible impulse, namely, he is so afflicted with pedophilia that he cannot "control the urge" to molest children; and (3) his pedophilia presents a serious danger to those children, I believe that Kansas can classify Hendricks as "mentally ill" and "dangerous" as this Court used those terms in *Foucha.*

The Kansas Supreme Court's contrary conclusion rested primarily upon that court's view that Hendricks would not qualify for civil commitment under Kansas' own state civil commitment statute. The issue before us, however, is one of constitutional interpretation. The Constitution does not require Kansas to write all of its civil commitment rules in a single statute or forbid it to write two separate statutes each covering somewhat different classes of committable individuals. Moreover, Hendricks apparently falls outside the scope of the Kansas general civil commitment statute because that statute permits confinement only of those who "lac[k] capacity to make an informed decision concerning treatment." Kan. Stat. Ann. § 59–2902(h) (1994). The statute does not tell us why it imposes this requirement. Capacity to make an informed decision about treatment is not always or obviously incompatible with severe mental illness. Neither Hendricks nor his *amici* point to a uniform body of professional opinion that says as much, and we have not found any. See, *e. g.*, American Psychiatric Assn., Guidelines for Legislation on the Psychiatric Hospitalization of Adults, 140 Am. J. Psychiatry 672, 673 (1983); Stromberg & Stone, A Model State Law on Civil Commitment of the Mentally Ill, 20 Harv. J. Legis. 275, 301–302 (1983); DeLand & Borenstein, Medicine Court, II, *Rivers* in Practice, 147 Am. J. Psychiatry 38 (1990). Consequently, the boundaries of the Federal Constitution and those of Kansas' general civil commitment statute are not congruent.

B

The Kansas Supreme Court also held that the Due Process Clause requires a State to provide treatment to those whom it civilly confines (as "mentally ill" and "dangerous"). It found that Kansas did not provide Hendricks with significant treatment. And it concluded that Hendricks' confinement violated the Due Process Clause for this reason as well.

This case does not require us to consider whether the Due Process Clause *always* requires treatment—whether, for example, it would forbid civil confinement of an *untreatable* mentally ill, dangerous person. To the contrary, Kansas argues that pedophilia is an "abnormality" or "illness" that can be treated. See Tr. of Oral Arg. 12 (Kansas Attorney General, in response to the question "you're claiming that there is some treatability . . . ?" answering "[a]bsolutely"); Brief for Petitioner 42–47. Two groups of mental health professionals agree. Brief for Association for the Treatment of Sexual Abusers as *Amicus Curiae* 11–12 (stating that "sex offenders can be treated" and that "increasing evidence" shows that "state-of-the-art treatment programs . . . significantly reduce recidivism"); Brief for Menninger Foundation et al. as *Amici Curiae* 28. Indeed, no one argues the contrary. Hence the legal question before us is whether the Clause forbids Hendricks' confinement unless Kansas provides him with treatment *that it concedes is available.*

Nor does anyone argue that Kansas somehow could have violated the Due Process Clause's *treatment* concerns had it provided Hendricks with the treatment that is potentially available (and I do not see how any such argument could succeed). Rather, the basic substantive due process treatment question is whether that Clause requires Kansas to provide treatment that it concedes is potentially available to a person whom it concedes is treatable. This same question is at the heart of my discussion of whether Hendricks' confinement violates the Constitution's *Ex Post Facto* Clause. See *infra,* at 383–395. For that reason, I shall not consider the substantive due process treatment question separately, but instead shall simply turn to the *Ex Post Facto* Clause discussion. As JUSTICE KENNEDY points out, *ante,* p. 371, some of the matters there discussed may later prove relevant to substantive due process analysis.

II

Kansas' 1994 Act violates the Federal Constitution's prohibition of "any . . . *ex post facto* Law" if it "inflicts" upon Hendricks "a greater punishment" than did the law "annexed to" his "crime[s]" when he "committed" those crimes in 1984. *Calder* v. *Bull,* 3 Dall. 386, 390 (1798) (opinion of Chase, J.); U. S. Const., Art. I, § 10. The majority agrees that the Clause " 'forbids the application of any *new punitive measure* to a crime already consummated.' " *California Dept. of Corrections* v. *Morales,* 514 U. S. 499, 505 (1995) (citation omitted; emphasis added). *Ante,* at 370–371. But it finds the Act is not "punitive." With respect to that basic question, I disagree with the majority.

Certain resemblances between the Act's "civil commitment" and traditional criminal punishments are obvious. Like criminal imprisonment, the Act's civil commitment amounts to "secure" confinement, Kan. Stat. Ann. § 59–29a07(a) (1994), and "incarceration against one's will," *In re Gault,* 387 U. S. 1, 50 (1967). See Testimony of Terry Davis, SRS Director of Quality Assurance, App. 52–54, 78–81 (confinement takes place in the psychiatric wing of a prison hospital where those whom the Act confines and ordinary prisoners are treated alike). Cf. *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.,* 492 U. S. 257, 298 (1989) (O'CONNOR, J., concurring in part and dissenting in part). In addition, a basic objective of the Act is incapacitation, which, as Blackstone said in describing an objective of criminal law, is to "depriv[e] the party injuring of the power to do future mischief." 4 W. Blackstone, Commentaries *11–*12 (incapacitation is one important purpose of criminal punishment); see also *Foucha,* 504 U. S., at 99 (KENNEDY, J., dissenting) ("Incapacitation for the protection of society is not an unusual ground for incarceration"); *United States* v. *Brown,* 381 U. S. 437, 458 (1965) ("Punishment serves several purposes: retributive, rehabilitative, deterrent—and preventative. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment"); 1 W. LaFave & A. Scott, Substantive Criminal Law § 1.5, p. 32 (1986); 18 U. S. C. § 3553(a); United States Sentencing Guidelines, Guidelines Manual, ch. 1, pt. A (Nov. 1995).

Moreover, the Act, like criminal punishment, imposes its confinement (or sanction) only upon an individual who has previously committed a criminal offense. Kan. Stat. Ann. §§ 59–29a02(a), 59–29a03(a) (1994). Cf. *Department of Revenue of Mont.* v. *Kurth Ranch,* 511 U. S. 767, 781 (1994) (fact that a tax on marijuana was "conditioned on the commission of a crime" is "'significant of [its] penal and prohibitory intent'" (citation omitted)); *Lipke* v. *Lederer,* 259 U. S. 557, 561–562 (1922). And the Act imposes that confinement through the use of persons (county prosecutors), procedural guarantees (trial by jury, assistance of counsel, psychiatric evaluations), and standards ("beyond a reasonable doubt") traditionally associated with the criminal law. Kan. Stat. Ann. §§ 59–29a06, 59–29a07 (1994).

These obvious resemblances by themselves, however, are not legally sufficient to transform what the Act calls "civil commitment" into a criminal punishment. Civil commitment of dangerous, mentally ill individuals by its very nature involves confinement and incapacitation. Yet "civil commitment," from a constitutional perspective, nonetheless remains civil. *Allen* v. *Illinois,* 478 U. S., at 369–370. Nor does the fact that criminal behavior triggers the Act make the critical difference. The Act's insistence upon a prior crime, by screening out those whose past behavior does not concretely demonstrate the existence of a mental problem or potential future danger, may serve an important noncriminal evidentiary purpose. Neither is the presence of criminal law-type procedures determinative. Those procedures can serve an important purpose that in this context one might consider noncriminal, namely, helping to prevent judgmental mistakes that would wrongly deprive a person of important liberty. *Id.*, at 371–372.

If these obvious similarities cannot by themselves prove that Kansas' "civil commitment" statute is criminal, neither can the word "civil" written into the statute, § 59–29a01, by itself prove the contrary. This Court has said that only the "clearest proof" could establish that a law the legislature called "civil" was, in reality, a "punitive" measure. *United States* v. *Ward*, 448 U. S. 242, 248–249 (1980). But the Court has also reiterated that a "civil label is not always dispositive," *Allen* v. *Illinois*, *supra*, at 369; it has said that in close cases the label is " 'not of paramount importance,' " *Kurth Ranch*, *supra*, at 777 (citation omitted); and it has looked behind a "civil" label fairly often, *e. g.*, *United States* v. *Halper*, 490 U. S. 435, 447 (1989).

In this circumstance, with important features of the Act pointing in opposite directions, I would place particular importance upon those features that would likely distinguish between a basically punitive and a basically nonpunitive purpose. *United States* v. *Ursery*, 518 U. S. 267, 278 (1996) (asking whether a statutory scheme was so punitive " 'either in purpose or effect' " to negate the legislature's " 'intention to establish a civil remedial mechanism' " (citations omitted)). And I note that the Court, in an earlier civil commitment case, *Allen* v. *Illinois*, 478 U. S., at 369, looked primarily to the law's concern for treatment as an important distinguishing feature. I do not believe that *Allen* means that a particular law's lack of concern for treatment, by itself, is enough to make an incapacitative law punitive. But, for reasons I will point out, when a State believes that treatment does exist, and then couples that admission with a legislatively required delay of such treatment until a person is at the end of his jail term (so that further incapacitation is therefore necessary), such a legislative scheme begins to look punitive.

In *Allen*, the Court considered whether, for Fifth Amendment purposes, proceedings under an Illinois statute were civil or "criminal." The Illinois statute, rather like the Kansas statute here, authorized the confinement of persons who were sexually dangerous, who had committed at least one prior sexual assault, and who suffered from a "mental disorder." *Id.*, at 366, n. 1. The *Allen* Court, looking behind the statute's "civil commitment" label, found the statute civil—in important part because the State had "provided for the treatment of those it commits." *Id.*, at 370 (also referring to facts that the State had "disavowed any interest in punishment" and that it had "established a system under which committed persons may be released after the briefest time in confinement").

In reaching this conclusion, the Court noted that the State Supreme Court had found the proceedings " 'essentially civil' " because the statute's aim was to provide " 'treatment, not punishment.' " *Id.*, at 367 (quoting *People* v. *Allen*, 107 Ill. 2d 91, 99–101, 481 N. E. 2d 690, 694–695 (1985)). It observed that the State had "a statutory obligation to provide 'care and treatment . . . designed to effect recovery' " in a "facility set aside to provide psychiatric care." 478 U. S., at 369 (quoting Ill. Rev. Stat., ch. 38, ¶ 105–8 (1985)). And it referred to the State's purpose as one of "*treating* rather than punishing sexually dangerous persons." 478 U. S., at 373; see also *ibid.* ("Had petitioner shown, for example, that the confinement . . . imposes . . . a regimen which is essentially identical to that imposed upon felons with no need for psychiatric care, this might well be a different case").

The *Allen* Court's focus upon treatment, as a kind of touchstone helping to distinguish civil from punitive purposes, is not surprising, for one would expect a nonpunitive statutory scheme to confine, not simply in order to protect, but also in order to cure. That is to say, one would expect a nonpunitively motivated legislature that confines *because of* a dangerous mental abnormality to seek to help the individual himself overcome that abnormality (at least insofar as professional treatment for the abnormality exists and is potentially helpful, as Kansas, supported by some groups of mental health professionals, argues is the case here, see *supra*, at 378). Conversely, a statutory scheme that provides confinement that does not reasonably fit a practically available, medically oriented treatment objective, more likely reflects a primarily punitive legislative purpose.

Several important treatment-related factors—factors of a kind that led the five-Member *Allen* majority to conclude that the Illinois Legislature's purpose was primarily civil, not punitive—in this action suggest precisely the opposite. First, the State Supreme Court here, unlike the state court in *Allen*, has held that treatment is not a significant objective of the Act. The Kansas court wrote that the Act's purpose is "segregation of sexually violent offenders," with "treatment" a matter that was "incidental at best." 259 Kan., at 258, 912 P. 2d, at 136. By way of contrast, in *Allen* the Illinois court had written that "'treatment, not punishment,'" was "the aim of the statute." *Allen*, *supra*, at 367 (quoting *People* v. *Allen*, *supra*, at 99–101, 481 N. E. 2d, at 694–695).

We have generally given considerable weight to the findings of state and lower federal courts regarding the intent or purpose underlying state officials' actions, see *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 829 (1995) (ordinarily "[w]e must . . . accept the state court's view of the purpose of its own law"); *Romer* v. *Evans*, 517 U. S. 620, 626 (1996); *Hernandez* v. *New York*, 500 U. S. 352, 366–370 (1991) (plurality opinion); *id.*, at 372 (O'CONNOR, J., concurring); *Edwards* v. *Aguillard*, 482 U. S. 578, 594, n. 15 (1987); but see *Department of Revenue of Mont.* v. *Kurth Ranch*, 511 U. S., at 776, 780, n. 18; *Stone* v. *Graham*, 449 U. S. 39, 40–43 (1980) *(per curiam)*; *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 533, 535–537 (1980), although the level of deference given to such findings varies with the circumstances, *Crawford* v. *Board of Ed. of Los Angeles*, 458 U. S. 527, 544, n. 30 (1982), and is not always as conclusive as a state court's construction of one of its statutes, see, *e. g., R. A. V.* v. *St. Paul,* 505 U. S. 377, 381 (1992). For example, *Allen*'s dissenters, as well as its majority, considered the state court's characterization of the state law's purpose an important factor in determining the constitutionality of that statute. *Allen,* 478 U. S., at 380 (STEVENS, J., dissenting) (describing the state court as "the final authority on the . . . purpose" of the statute).

The record provides support for the Kansas court's conclusion. The court found that, as of the time of Hendricks' commitment, the State had not funded treatment, it had not entered into treatment contracts, and it had little, if any, qualified treatment staff. See 259 Kan., at 249, 258, 912 P. 2d, at 131, 136; Testimony of Dr. Charles Befort, App. 255 (acknowledging that he has no specialized training); Testimony of John House, SRS Attorney, *id.,* at 367 (no contract has been signed by bidders); Testimony of John House, SRS Attorney, *id.,* at 369 (no one hired to operate sexually violent predator (SVP) program or to serve as clinical director, psychiatrist, or psychologist). Indeed, were we to follow the majority's invitation to look beyond the record in this case, an invitation with which we disagree, see *infra,* at 391–393, it would reveal that Hendricks, according to the commitment program's own director, was receiving "essentially no treatment." Dr. Charles Befort in State Habeas Corpus Proceeding, App. 393; 259 Kan., at 249, 258, 912 P. 2d, at 131, 136. See also App. 421 ("[T]he treatment that is prescribed by statute" is "still not available"); *id.,* at 420–421 (the "needed treatment" "hasn't been delivered yet" and "Hendricks has wasted ten months" in "terms of treatment effects"); *id.,* at 391–392 (Dr. Befort admitting that he is not qualified to be SVP program director).

It is therefore not surprising that some of the Act's official supporters had seen in it an opportunity permanently to confine dangerous sex offenders, *e. g., id.,* at 468 (statement of Attorney General Robert Stephan); *id.,* at 475–476, 478 (statement of Special Assistant to the Attorney General

Carla Stovall). Others thought that effective treatment did not exist, *id.*, at 503 (statement of Jim Blaufuss) ("Because there is no effective treatment for sex offenders, this Bill may mean a life sentence for a felon that is considered a risk to women and children. SO BE IT!")—a view, by the way, that the State of Kansas, supported by groups of informed mental health professionals, here strongly denies. See *supra*, at 378.

The Kansas court acknowledged the existence of "provisions of the Act for treatment" (although it called them "somewhat disingenuous"). 259 Kan., at 258, 912 P. 2d, at 136. Cf. Kan. Stat. Ann. § 59–29a01 (1994) (legislative findings that "prognosis for rehabilita[tion] . . . in a prison setting is poor, . . . treatment needs . . . long term" and "commitment procedure for . . . long term care and treatment . . . necessary"); § 59–29a09 ("commitment . . . shall conform to constitutional requirements for care and treatment"). Nor did the court deny that Kansas could later increase the amount of treatment it provided. But the Kansas Supreme Court could, and did, use the Act's language, history, and initial implementation to help it characterize the Act's primary purposes.

Second, the Kansas statute, insofar as it applies to previously convicted offenders such as Hendricks, commits, confines, and treats those offenders *after* they have served virtually their entire criminal sentence. That time-related circumstance seems deliberate. The Act explicitly defers diagnosis, evaluation, and commitment proceedings until a few weeks prior to the "anticipated release" of a previously convicted offender from prison. Kan. Stat. Ann. § 59–29a03(a)(1) (1994). But why, one might ask, does the Act not commit and require treatment of sex offenders sooner, say, soon after they begin to serve their sentences?

An Act that simply seeks confinement, of course, would not need to begin civil commitment proceedings sooner. Such an Act would have to begin proceedings only when an offender's prison term ends, threatening his release from the confinement that imprisonment assures. But it is difficult to see why rational legislators who seek treatment would write the Act in this way—providing treatment years after the criminal act that indicated its necessity. See, *e. g.*, Wettstein, A Psychiatric Perspective on Washington's Sexually Violent Predators Statute, 15 U. Puget Sound L. Rev. 597, 617 (1992) (stating that treatment delay leads to "loss of memory" and makes it "more difficult for the offender" to "accept responsibility," and that time in prison leads to attitude hardening that "engender[s] a distorted view of the precipitating offense"). And it is particularly difficult to see why legislators who specifically wrote into the statute a finding that "prognosis for rehabilitating . . . in a prison setting is poor" would leave an offender in that setting for months or years before beginning treatment. This is to say, the timing provisions of the statute confirm the Kansas Supreme Court's view that treatment was not a particularly important legislative objective.

I recognize one possible counterargument. A State, wanting both to punish Hendricks (say, for deterrence purposes) and also to treat him, might argue that it should be permitted to postpone treatment until after punishment in order to make certain that the punishment in fact occurs. But any such reasoning is out of place here. Much of the treatment that Kansas offered here (called "ward milieu" and "group therapy") can be given at the same time as, and in the same place where, Hendricks serves his punishment. See, *e. g.*, Testimony of Leroy Hendricks, App. 142–143, 150, 154, 179–181 (stating that Washington and Kansas had both provided group therapy to Hendricks, and that he had both taken and refused such treatment at various points); Testimony of Terry Davis, SRS Director of Quality Assurance, *id.*, at 78–81 (pointing out that treatment under the Act takes place in surroundings very similar to those in which prisoners receive treatment); Testimony of John House, SRS

Attorney, *id.*, at 375–376. See also Task Force on Community Protection, Final Report to Booth Gardner, Governor State of Washington II–2 (1989) (findings of task force that developed the Washington State Act, which served as a model for Kansas' Act, stating that "[s]ex offenders can be treated during incarceration"). The evidence adduced at the state habeas proceeding, were we to assume it properly before the Court, see *infra*, at 392–393, supports this conclusion as well. See Testimony of Dr. Befort at State Habeas Proceeding, App. 399, 406–408 (describing treatment as ward milieu and group therapy); *id.*, at 416–417 (stating that Kansas offers similar treatment, on a voluntary basis, to prisoners). Hence, assuming, *arguendo*, that it would be otherwise permissible, Kansas need not postpone treatment in order to make certain that sex offenders serve their full terms of imprisonment, *i. e.*, to make certain that they receive the entire punishment that Kansas criminal law provides. To the contrary, the statement in the Act itself, that the Act aims to respond to special "long term" "treatment needs," suggests that treatment should begin during imprisonment. It also suggests that, were those long-term treatment needs (rather than further punishment) Kansas' primary aim, the State would require that treatment begin soon after conviction, not 10 or more years later. See also Vt. Stat. Ann., Tit. 18, §2815 (1959) (providing for treatment of sexual psychopaths first, and punishment afterwards).

Third, the statute, at least as of the time Kansas applied it to Hendricks, did not require the committing authority to consider the possibility of using less restrictive alternatives, such as postrelease supervision, halfway houses, or other methods that *amici* supporting Kansas here have mentioned. Brief for Menninger Foundation et al. as *Amici Curiae* 28; Brief for Association for the Treatment of Sexual Abusers as *Amicus Curiae* 11–12. The laws of many other States require such consideration. See Appendix, *infra*.

This Court has said that a failure to consider, or to use, "alternative and less harsh methods" to achieve a nonpunitive objective can help to show that legislature's "purpose . . . was to punish." *Bell* v. *Wolfish,* 441 U. S. 520, 539, n. 20 (1979). And one can draw a similar conclusion here. Legislation that seeks to help the individual offender as well as to protect the public would avoid significantly greater restriction of an individual's liberty than public safety requires. See Keilitz, Conn, & Gianpetro, Least Restrictive Treatment of Involuntary Patients: Translating Concepts into Practice, 29 St. Louis U. L. J. 691, 693 (1985) (describing "least restrictive alternativ[e]" provisions in the ordinary civil commitment laws of almost all States); Lyon, Levine, & Zusman, Patients' Bill of Rights: A Survey of State Statutes, 6 Mental Disability L. Rep. 178, 181–183 (1982) (same). Legislation that seeks almost exclusively to incapacitate the individual through confinement, however, would not necessarily concern itself with potentially less restrictive forms of incapacitation. I would reemphasize that this is not a case in which the State claims there is no treatment potentially available. Rather, Kansas, and supporting *amici,* argue that pedophilia is treatable. See *supra,* at 378.

Fourth, the laws of other States confirm, through comparison, that Kansas' "civil commitment" objectives do not require the statutory features that indicate a punitive purpose. I have found 17 States with laws that seek to protect the public from mentally abnormal, sexually dangerous individuals through civil commitment or other mandatory treatment programs. Ten of those statutes, unlike the Kansas statute, begin treatment of an offender soon after he has been apprehended and charged with a serious sex offense. Only seven, like Kansas, delay "civil" commitment (and treatment) until the offender has served his criminal sentence (and this figure includes the Acts of Minnesota and New Jersey, both of which generally do not delay treatment). Of these seven, however, six (unlike Kansas) require consideration of less re-

strictive alternatives. See Ariz. Rev. Stat. Ann. §§ 13–4601, 4606B (Supp. 1996–1997); Cal. Welf. & Inst. Code Ann. §§ 6607, 6608 (West Supp. 1997); Minn. Stat. § 253B.09 (1996); N. J. Stat. Ann. § 30:4–27.11d (West 1997); Wash. Rev. Code Ann. § 71.09.090 (Supp. 1996–1997); Wis. Stat. § 980.06(2)(b) (Supp. 1993–1994). Only one State other than Kansas, namely Iowa, both delays civil commitment (and consequent treatment) and does not explicitly consider less restrictive alternatives. But the law of that State applies prospectively only, thereby avoiding *ex post facto* problems. See Iowa Code Ann. § 709C.12 (Supp. 1997) (Iowa SVP Act only "applies to persons convicted of a sexually violent offense on or after July 1, 1997"); see also Appendix, *infra*. Thus the practical experience of other States, as revealed by their statutes, confirms what the Kansas Supreme Court's finding, the timing of the civil commitment proceeding, and the failure to consider less restrictive alternatives, themselves suggest, namely, that for *Ex Post Facto* Clause purposes, the purpose of the Kansas Act (as applied to previously convicted offenders) has a punitive, rather than a purely civil, purpose.

Kansas points to several cases as support for a contrary conclusion. It points to *Allen*—which is, as we have seen, a case in which the Court concluded that Illinois' "civil commitment" proceedings were not criminal. I have explained in detail, however, how the statute here differs from that in *Allen*, and why *Allen*'s reasoning leads to a different conclusion in this litigation. See *supra*, at 381–388 and this page.

Kansas also points to *Addington* v. *Texas*, where the Court held that the Constitution does not require application of criminal law's "beyond a reasonable doubt" standard in a civil commitment proceeding. 441 U. S., at 428. If some criminal law guarantees such as "reasonable doubt" did not apply in *Addington*, should other guarantees, such as the prohibition against *ex post facto* laws, apply here? The answer to this question, of course, lies in the particular statute at issue in *Addington*—a Texas statute that, this Court observed, did "not exercis[e]" state power "in a punitive sense." *Ibid.* That statute did not add civil commitment's confinement to imprisonment; rather civil commitment was, at most, a substitute for criminal punishment. See Tex. Rev. Civ. Stat. Ann. § 5547–41 (Vernon 1958) (petition must state "proposed patient is not charged with a crime or [is] charged [but] transferred . . . for civil commitment proceedings"). And this Court, relying on the Texas Supreme Court's interpretation, wrote that the "State of Texas confines only for the purpose of providing care designed to treat the individual." *Addington, supra,* at 428, n. 4 (citing *State* v. *Turner,* 556 S. W. 2d 563, 566 (1977)). Cf. *Specht* v. *Patterson,* 386 U. S. 605, 608–609 (1967) (separate postconviction sexual psychopath commitment/sentencing proceeding held after conviction for serious sex crime, imposes a "criminal punishment even though . . . designed not so much as retribution as . . . to keep individuals from inflicting future harm"). Nothing I say here would change the reach or holding of *Addington* in any way. That is, a State is free to commit those who are dangerous and mentally ill in order to treat them. Nor does my decision preclude a State from deciding that a certain subset of people are mentally ill, dangerous, and untreatable, and that confinement of this subset is therefore necessary (again, assuming that all the procedural safeguards of *Addington* are in place). But when a State decides offenders can be treated and confines an offender to provide that treatment, but then refuses to provide it, the refusal to treat while a person is fully incapacitated begins to look punitive.

The majority suggests that this is the very case I say it is not, namely, a case of a mentally ill person who is *untreatable. Ante,* at 365. And it quotes a long excerpt from the Kansas Supreme Court's opinion in support. That court, however, did not find that Hendricks was untreat*able;* it found that he was untreat*ed*—quite a different matter. Had the Kansas Supreme Court thought that Hendricks, or others like him, are untreatable, it could not have written the words that follow that excerpt, adopting by reference the words of another court opinion:

> "'The statute forecloses the possibility that offenders will be evaluated and treated until after they have been punished. . . . Setting aside the question of whether a prison term exacerbates or minimizes the mental condition of a sex offender, it plainly delays the treatment that must constitutionally accompany commitment pursuant to the Statute. The failure of the Statute to provide for examination or treatment prior to the completion of the punishment phase strongly suggests that treatment is of secondary, rather than primary, concern.'" 259 Kan., at 258, 912 P. 2d, at 136 (quoting *Young* v. *Weston*, 898 F. Supp. 744, 753 (WD Wash. 1995)).

This quotation, and the rest of the opinion, make clear that the court is finding it objectionable that the statute, among other things, has not provided adequate treatment to one who, all parties here concede, *can* be treated.

The majority suggests in the alternative that recent evidence shows that Kansas is now providing treatment. *Ante*, at 366–368. That evidence comes from two sources: First, a statement by the Kansas Attorney General at oral argument that those committed under the Act are now receiving treatment, *ante*, at 368; and second, in a footnote, a Kansas trial judge's statement, in a state habeas proceeding nearly one year after Hendricks was committed, that Kansas is providing treatment. *Ante*, at 368, n. 5. I do not see how either of these statements can be used to justify the validity of the Act's application to Hendricks at the time he filed suit.

We are reviewing the Kansas Supreme Court's determination of Hendricks' case. Neither the majority nor the lengthy dissent in that court referred to the two facts that the majority now seizes upon, and for good reason. That court denied a motion to take judicial notice of the state habeas proceeding, see Order of Kansas Supreme Court, No. 94–73039, Mar. 1, 1996. The proceeding is thus not part of the record, and cannot properly be considered by this Court. And the Kansas Supreme Court obviously had no chance to consider Kansas' new claim made at oral argument before this Court. There is simply no evidence in the record before this Court that comes even close to resembling the assertion Kansas made at oral argument. It is the record, not the parties' view of it, that must control our decision. See *Russell* v. *Southard,* 12 How. 139, 158–159 (1851); *Adickes* v. *S. H. Kress & Co.,* 398 U. S. 144, 157–158, n. 16 (1970); *Hopt* v. *Utah,* 114 U. S. 488, 491–492 (1885); *Witters* v. *Washington Dept. of Servs. for Blind,* 474 U. S. 481, 489, n. 3 (1986); *New Haven Inclusion Cases,* 399 U. S. 392, 450, n. 66 (1970); R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice 555–556, 594 (7th ed. 1993); Fed. Rule Evid. 201(b).

The prohibition on facts found outside the record is designed to ensure the reliability of the evidence before the Court. For purposes of my argument in this dissent, however, the material that the majority wishes to consider, when read in its entirety, shows that Kansas was *not* providing treatment to Hendricks. At best, the testimony at the state hearing contained general and vague references that treatment was about to be provided, but it contains *no statement* that Hendricks *himself* was receiving treatment. And it provides the majority with no support at all in respect to that key fact. Indeed, it demonstrates the contrary conclusion. For example, the program's director, Dr. Befort, testified that he would have to tell the court at Hendricks' next annual review, in October 1995, that Hendricks "has had no opportunity for meaningful treatment." App. 400. He also stated that SVP's were receiving "essentially no treatment" and that the program does not "have adequate staffing." *Id.*, at 393, 394. And Dr. Befort's last words made clear that Hendricks has "wasted ten months . . . in terms of treatment effects" and that, as far as treatment goes, "[t]oday, it's still not available." *Id.*, at 420–421. Nor does the assertion made by the Kansas Attorney General at oral argument help the majority. She never stated that *Hendricks*, as opposed to other SVP's, was receiving this treatment. And we can find no support for her statement in the record.

We have found no other evidence in the record to support the conclusion that Kansas was in fact providing the treatment that all parties agree that it could provide. Thus, even had the Kansas Supreme Court considered the majority's new evidence—which it did not—it is not likely to have changed its characterization of the Act's treatment provisions as "somewhat disingenuous." 259 Kan., at 258, 912 P. 2d, at 136.

Regardless, the Kansas Supreme Court did so characterize the Act's treatment provisions and did find that treatment was "at best" an "incidental" objective. Thus, the circumstances here are different from *Allen*, where the Illinois Supreme Court explicitly found that the statute's aim was to provide treatment, not punishment. See *supra*, at 382–384. There is no evidence in the record that contradicts the finding of the Kansas court. Thus, *Allen*'s approach—its reliance on the state court—if followed here would mean the Act as applied to *Leroy Hendricks* (as opposed to others who may have received treatment or who were sentenced after the effective date of the Act) is punitive.

Finally, Kansas points to *United States* v. *Salerno*, 481 U. S. 739 (1987), a case in which this Court held preventive detention of a dangerous accused person pending trial constitutionally permissible. *Salerno*, however, involved the brief detention of that person, after a finding of "probable cause" that he had committed a crime that would justify further imprisonment, and only pending a speedy judicial determination of guilt or innocence. This Court, in *Foucha*, emphasized the fact that the confinement at issue in *Salerno* was "strictly limited in duration." 504 U. S., at 82. It described that "pretrial detention of arrestees" as "one of those carefully limited exceptions permitted by the Due Process Clause." *Id.*, at 83. And it held that *Salerno* did not authorize the indefinite detention, on grounds of dangerousness, of "insanity acquittees who are not mentally ill but who do not prove they would not be dangerous to others." 504 U. S., at 83. Whatever *Salerno*'s "due process" implications may be, it does not focus upon, nor control, the question at issue here, the question of "punishment" for purposes of the *Ex Post Facto* Clause.

One other case warrants mention. In *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144 (1963), this Court listed seven factors that helped it determine whether a particular statute was primarily punitive for purposes of applying the Fifth and Sixth Amendments. Those factors include whether a sanction involves an affirmative restraint, how history has regarded it, whether it applies to behavior already a crime, the need for a finding of scienter, its relationship to a traditional aim of punishment, the presence of a nonpunitive alternative purpose, and whether it is excessive in relation to that purpose. *Id.*, at 169. This Court has said that these seven factors are "neither exhaustive nor dispositive," but nonetheless "helpful." *Ward*, 448 U. S., at 249. Paraphrasing them here, I believe the Act before us involves an affirmative restraint historically regarded as punishment; imposed upon behavior already a crime after a finding of scienter; which restraint, namely, confinement, serves a traditional aim of punishment, does not primarily serve an alternative purpose (such as treatment), and is excessive in relation to any alternative purpose assigned. 372 U. S., at 168–169.

This is not to say that each of the factors the Court mentioned in *Martinez-Mendoza* on balance argues here in favor of a constitutional characterization as "punishment." It is not to say that I have found "a single 'formula' for identifying those legislative changes that have a sufficient effect on substantive crimes or punishments to fall within the constitutional prohibition," *Morales*, 514 U. S., at 509; see also *Halper*, 490 U. S., at 447; *id.*, at 453 (KENNEDY, J., concurring). We have not previously done so, and I do not do so here. Rather, I have pointed to those features of the Act itself, in the context of this litigation, that lead me to conclude, in light of our precedent, that the added confinement the Act imposes upon Hendricks is basically punitive. This analysis, rooted in the facts surrounding Kansas' failure to treat Hendricks, cannot answer the question whether the Kansas Act, as it now stands, and in light of its current implementation, is punitive toward people other than he. And I do not attempt to do so here.

III

To find that the confinement the Act imposes upon Hendricks is "punishment" is to find a violation of the *Ex Post Facto* Clause. Kansas does not deny that the 1994 Act changed the legal consequences that attached to Hendricks' earlier crimes, and in a way that significantly "disadvantage[d] the offender," *Weaver* v. *Graham*, 450 U. S. 24, 29 (1981). See Brief for Respondent State of Kansas 37–39.

To find a violation of that Clause here, however, is not to hold that the Clause prevents Kansas, or other States, from enacting dangerous sexual offender statutes. A statute that operates prospectively, for example, does not offend the *Ex Post Facto* Clause. *Weaver*, 450 U. S., at 29. Neither does it offend the *Ex Post Facto* Clause for a State to sentence offenders to the fully authorized sentence, to seek consecutive, rather than concurrent, sentences, or to invoke recidivism statutes to lengthen imprisonment. Moreover, a statute that operates retroactively, like Kansas' statute, nonetheless does not offend the Clause *if the confinement that it imposes is not punishment*—if, that is to say, the legislature does not simply add a later criminal punishment to an earlier one. *Ibid.*

The statutory provisions before us do amount to punishment primarily because, as I have said, the legislature did not tailor the statute to fit the nonpunitive civil aim of treatment, which it concedes exists in Hendricks' case. The Clause in these circumstances does not stand as an obstacle to achieving important protections for the public's safety; rather it provides an assurance that, where so significant a restriction of an individual's basic freedoms is at issue, a State cannot cut corners. Rather, the legislature must hew to the Constitution's liberty-protecting line. See The Federalist No. 78, p. 466 (C. Rossiter ed. 1961) (A. Hamilton).

I therefore would affirm the judgment below.

APPENDIX TO OPINION OF BREYER, J.

SELECTED SEXUAL OFFENSE COMMITMENT STATUTES

(Kansas is the only State that answers "yes"
to all three categories)

State	*Delays Treatment*	*Fails to Consider Less Restrictive Alternatives*	*Applies to Pre-Act Crimes*
Ariz. Rev. Stat. Ann. § 13–4601 *et seq.* (Supp. 1996–1997)	Yes	No	*
Cal. Welf. & Inst. Code Ann. § 6600 *et seq.* (West Supp. 1997)	Yes	No	Yes
Colo. Rev. Stat. § 16–11.7–101 *et seq.* (Supp. 1996)	No	Yes	Sometimes
Conn. Gen. Stat. § 17a–566 *et seq.* (1992 and Supp. 1996)	No	*	*
Ill. Comp. Stat., ch. 725, § 205 *et seq.* (1994)	No	No	
Iowa Code Ann. ch. 709C (Supp. 1996)	Yes	Yes	No
Kan. Stat. Ann. § 59–29a01 *et seq.* (1994)	Yes	Yes	Yes
Mass. Gen. Laws, ch. 123A (Supp. 1997)	No	*	*
Minn. Stat. Ann., ch. 253B (1994 and Supp. 1996–1997)	Sometimes	No	Yes

Appendix to opinion of BREYER, J.

SELECTED SEXUAL OFFENSE COMMITMENT STATUTES—Continued

State	*Delays Treatment*	*Fails to Consider Less Restrictive Alternatives*	*Applies to Pre-Act Crimes*
Neb. Rev. Stat. § 29–2923 *et seq.* (Supp. 1996)	No	No	Generally not
N. J. Stat. Ann. § 30:4–82.4 *et seq.* (West 1997)	Sometimes	No	*
N. M. Stat. Ann. § 43–1–1 *et seq.* (1993)	No	No	*
Ore. Rev. Stat. § 426.510 *et seq.* (1995)	No	Yes	Generally not
Tenn. Code Ann. § 33–6–301 *et seq.* (1984 and Supp. 1996)	No	Yes	*
Utah Code Ann. § 77–16–1 *et seq.* (1995)	No	Yes	Generally not
Wash. Rev. Code Ann. § 71.09.01 *et seq.* (1992 and Supp. 1996–1997)	Yes	No	Yes
Wis. Stat. § 980.010 *et seq.* (Supp. 1993–1994)	Yes	No	Yes

(* = designation that the statute does not specify)

RICHARDSON ET AL. *v.* McKNIGHT

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 96–318. Argued March 19, 1997—Decided June 23, 1997

Respondent McKnight, a prisoner at a Tennessee correctional center whose management had been privatized, filed this constitutional tort action under 42 U. S. C. § 1983 for physical injuries inflicted by petitioner prison guards. The District Court denied petitioners' motion to dismiss, finding that, since they were employed by a private prison management firm, they were not entitled to qualified immunity from § 1983 lawsuits. The Court of Appeals affirmed.

Held: Prison guards employed by a private firm are not entitled to a qualified immunity from suit by prisoners charging a § 1983 violation. Pp. 402–414.

(a) Four aspects of *Wyatt* v. *Cole,* 504 U. S. 158—in which this Court found no § 1983 immunity for private defendants charged with invoking state replevin, garnishment, and attachment statutes later declared unconstitutional—are instructive here. First, § 1983—which deters state actors from depriving individuals of their federally protected rights—can sometimes impose liability upon private individuals. Second, a distinction exists between an immunity from suit—which frees one from liability whether or not he acted wrongly—and other legal defenses—which may well involve the essence of the wrong. Third, history and the purposes underlying § 1983 immunity determine whether private defendants enjoy protection from suit. Fourth, the *Wyatt* holding was limited to the narrow question before the Court and is not applicable to *all* private individuals. Pp. 402–404.

(b) History does not reveal a firmly rooted tradition of immunity applicable to privately employed prison guards. While *government*-employed prison guards may have enjoyed a kind of immunity defense arising out of their status as public employees at common law, see *Procunier* v. *Navarette,* 434 U. S. 555, 561–562, correctional functions have never been exclusively public. In the 19th century both private entities and government itself carried on prison management activities. There is no conclusive evidence of a historical tradition of immunity for private parties carrying out these functions. Pp. 404–407.

(c) The immunity doctrine's purposes also do not warrant immunity for private prison guards. Mere performance of a governmental function does not support immunity for a private person, especially one who performs a job without government supervision or direction. Petitioners' argument to the contrary overlooks certain important differences that are critical from an immunity perspective. First, the most important special government immunity-producing concern—protecting the public from unwarranted timidity on the part of public officials—is less likely present when a private company subject to competitive market pressures operates a prison. A firm whose guards are too aggressive will face damages that raise costs, thereby threatening its replacement by another contractor, but a firm whose guards are too timid will face replacement by firms with safer and more effective job records. Such marketplace pressures are present here, where the firm is systematically organized, performs independently, is statutorily obligated to carry insurance, and must renew its first contract after three years. And they provide the private firm with incentives to avoid overly timid job performance. To this extent, the employees differ from government employees, who act within a system that is responsible through elected officials to the voters and that is often characterized by civil service rules providing employee security but limiting the government departments' flexibility to reward or punish individual employees. Second, privatization helps to meet the immunity-related need to ensure that talented candidates are not deterred by the threat of damages suits from entering public service. Comprehensive insurance coverage increases the likelihood of employee indemnification and to that extent reduces the employment-discouraging fear of unwarranted liability. Since a private firm is also freed from many civil service restraints, it, unlike a government department, may offset increased employee liability risk with higher pay or extra benefits. Third, while lawsuits may distract private employees from their duties, the risk of distraction alone cannot be sufficient grounds for an immunity. Tennessee, which has decided not to extend sovereign immunity to private prison operators, can, moreover, be understood to have anticipated a certain amount of distraction. Pp. 407–412.

(d) The Court closes with three caveats. First, the focus has been on § 1983 immunity, not liability. Second, the immunity question has been answered narrowly, in the context in which it arose, and, thus, does not involve a private individual briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision. Third, no opinion is expressed on the issue whether petitioners might assert not immunity, but a special good-faith defense. Pp. 413–414.

88 F. 3d 417, affirmed.

BREYER, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, SOUTER, and GINSBURG, JJ., joined. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and KENNEDY and THOMAS, JJ., joined, *post*, p. 414.

Charles R. Ray argued the cause for petitioners. With him on the briefs was *Robert S. Catz.*

David C. Vladeck argued the cause for respondent. With him on the brief were *Michael E. Tankersley* and *Alan B. Morrison.*

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Acting Solicitor General Dellinger, Assistant Attorney General Hunger, Deputy Solicitor General Waxman, Deputy Assistant Attorney General Preston, Cornelia T. L. Pillard, Barbara L. Herwig,* and *John F. Daly.**

JUSTICE BREYER delivered the opinion of the Court.

The issue before us is whether prison guards who are employees of a private prison management firm are entitled to a qualified immunity from suit by prisoners charging a violation of 42 U. S. C. § 1983. We hold that they are not.

I

Ronnie Lee McKnight, a prisoner at Tennessee's South Central Correctional Center (SCCC), brought this federal constitutional tort action against two prison guards, Darryl Richardson and John Walker. He says the guards injured him by placing upon him extremely tight physical restraints, thereby unlawfully "subject[ing]" him "to the deprivation of" a right "secured by the Constitution" of the United States. Rev. Stat. § 1979, 42 U. S. C. § 1983. Richardson and Walker asserted a qualified immunity from § 1983 lawsuits, see *Harlow* v. *Fitzgerald,* 457 U. S. 800, 807 (1982), and moved to dismiss the action. The District Court noted that Tennessee had "privatized" the management of a number of its correctional facilities, and that consequently a private firm, not the state government, employed the guards. See Tenn. Code Ann. § 41–24–101 *et seq.* (1990 and Supp. 1996); see generally Cody & Bennett, The Privatization of Correctional Institutions: The Tennessee Experience, 40 Vand. L. Rev. 829 (1987) (outlining State's history with private correctional services). The court held that, because they worked for a private company rather than the government, the law did not grant the guards immunity from suit. It therefore denied the guards' motion to dismiss. The guards appealed to the Sixth Circuit. See *Mitchell* v. *Forsyth,* 472 U. S. 511, 530 (1985) (permitting interlocutory appeals of qualified immunity determinations); see also *Johnson* v. *Jones,* 515 U. S. 304 (1995); *Behrens* v. *Pelletier,* 516 U. S. 299 (1996). That court also ruled against them. *McKnight* v. *Rees,* 88 F. 3d 417, 425 (CA6 1996). The Court of Appeals conceded that other courts had reached varying conclusions about whether, or the extent to which, private sector defendants are entitled to immunities of the sort the law provides governmental defendants. See, *e. g., Eagon* v. *Elk City,* 72 F. 3d 1480, 1489–1490 (CA10 1996); *Williams* v. *O'Leary,* 55 F. 3d 320, 323–324 (CA7), cert. denied, 516 U. S. 993 (1995); *Frazier* v. *Bailey,* 957 F. 2d 920, 928–929 (CA1 1992). But the court concluded, primarily for reasons of "public policy," that the privately employed prison guards were not entitled to the immunity provided their governmental counterparts. 88 F. 3d, at 425. We granted certiorari to review this holding. We now affirm.

**Richard Ruda* and *James I. Crowley* filed a brief for the International City/County Management Association et al. as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Penny M. Venetis* and *Steven R. Shapiro;* and for the American Federation of Government Employees, AFL–CIO, by *Mark D. Roth* and *Anne M. Wagner.*

II

A

We take the Court's recent case, *Wyatt* v. *Cole,* 504 U. S. 158 (1992), as pertinent authority. The Court there considered whether private defendants, charged with § 1983 liability for "invoking state replevin, garnishment, and attachment statutes" later declared unconstitutional were "entitled to qualified immunity from suit." *Id.*, at 159. It held that they were not. *Id.*, at 169. We find four aspects of *Wyatt* relevant here.

First, as *Wyatt* noted, § 1983 basically seeks "to deter *state* actors from using the badge of their authority to deprive individuals of their federally guaranteed rights" and to provide related relief. *Id.*, at 161 (emphasis added) (citing *Carey* v. *Piphus*, 435 U. S. 247, 254–257 (1978)); see also *Owen* v. *Independence*, 445 U. S. 622, 654 (1980). It imposes liability only where a person acts "under color" of a state "statute, ordinance, regulation, custom, or usage." 42 U. S. C. § 1983. Nonetheless, *Wyatt* reaffirmed that § 1983 can *sometimes* impose liability upon a private individual. 504 U. S., at 162; see also *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 924 (1982).

Second, *Wyatt* reiterated that after *Harlow, supra,* and this Court's reformulation of the qualified immunity doctrine, see *Anderson* v. *Creighton*, 483 U. S. 635, 645 (1987), a distinction exists between an "immunity from suit" and other kinds of legal defenses. 504 U. S., at 166–167; see also *Mitchell, supra,* at 526. As the *Wyatt* concurrence pointed out, a legal defense may well involve "the essence of the wrong," while an immunity frees one who enjoys it from a lawsuit whether or not he acted wrongly. 504 U. S., at 171–172 (KENNEDY, J., concurring).

Third, *Wyatt* specified the legal source of § 1983 immunities. It pointed out that although § 1983 " 'creates a species of tort liability that on its face admits of no immunities,' " *id.*, at 163 (quoting *Imbler* v. *Pachtman*, 424 U. S. 409, 417 (1976)), this Court has nonetheless accorded immunity where a

> " 'tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that "Congress would have specifically so provided had it wished to abolish the doctrine." ' " 504 U. S., at 164 (quoting *Owen* v. *Independence, supra,* at 637).

The *Wyatt* majority, in deciding whether or not the private defendants enjoyed immunity, looked both to history and to "the special policy concerns involved in suing government officials." 504 U. S., at 167; see also *Mitchell, supra,* at 526; *Harlow, supra,* at 807; *Imbler* v. *Pachtman, supra,* at 424. And in this respect—the relevant *sources* of the law—both the *Wyatt* concurrence and the dissent seemed to agree. Compare 504 U. S., at 169–171 (KENNEDY, J., concurring) (existence of immunity depends upon "historical origins" and "public policy"), with *id.,* at 175–176 (REHNQUIST, C. J., dissenting) ("immunity" recognized where "similarly situated defendant would have enjoyed an immunity at common law" or "when important public policy concerns suggest the need for an immunity").

Fourth, *Wyatt* did not consider its answer to the question before it as one applicable to *all* private individuals—irrespective of the nature of their relation to the government, position, or the kind of liability at issue. Rather, *Wyatt* explicitly limited its holding to what it called a "narrow" question about "private persons . . . who conspire with state officials," *id.,* at 168, and it answered that question by stating that private defendants "faced with § 1983 liability for invoking a state replevin, garnishment, or attachment statute" are *not* entitled to immunity, *id.,* at 168–169.

Wyatt, then, did not answer the legal question before us, whether petitioners—two employees of a private prison management firm—enjoy a qualified immunity from suit under § 1983. It does tell us, however, to look both to history and to the purposes that underlie government employee immunity in order to find the answer. *Id.,* at 164; see also *Newport* v. *Fact Concerts, Inc.,* 453 U. S. 247, 259 (1981); *Owen, supra,* at 638; *Imbler, supra,* at 424.

B

History does *not* reveal a "firmly rooted" tradition of immunity applicable to privately employed prison guards.

Correctional services in the United States have undergone various transformations. See D. Shichor, Punishment for Profit 33, 36 (1995) (Shichor). *Government*-employed prison guards may have enjoyed a kind of immunity defense arising out of their status as public employees at common law. See *Procunier* v. *Navarette*, 434 U. S. 555, 561–562 (1978) (extending qualified immunity to state prison guards). But correctional functions have never been exclusively public. Shichor 33, 36. Private individuals operated local jails in the 18th century, G. Bowman, S. Hakim, & P. Seidenstat, Privatizing the United States Justice System 271, n. 1 (1992), and private contractors were heavily involved in prison management during the 19th century. Shichor 33, 36.

During that time, some States, including southern States like Tennessee, leased their entire prison systems to private individuals or companies which frequently took complete control over prison management, including inmate labor and discipline. G. Bowman, S. Hakim, & P. Seidenstat, Privatizing Correctional Institutions 42 (1993); see generally B. McKelvey, American Prisons: A Study in American Social History Prior to 1915, pp. 172–180 (1968) (describing 19th-century American prison system); see also Shichor 34; G. de Beaumont & A. de Tocqueville, On the Penitentiary System in the United States and Its Application in France 35 (1833) (describing more limited prison contracting system in Massachusetts and Pennsylvania). Private prison lease agreements (like inmate suits) seem to have been more prevalent after § 1983's enactment, see generally M. Mancini, One Dies, Get Another (1996), but we have found evidence that the common law provided mistreated prisoners in prison leasing States with remedies against mistreatment by those private lessors. See, *e. g., Dade Coal Co.* v. *Haslett*, 83 Ga. 549, 550–551, 10 S. E. 435, 435–436 (1889) (convict can recover from contractor for injuries sustained while on lease to private company); *Boswell* v. *Barnhart*, 96 Ga. 521, 522–523, 23 S. E. 414, 415 (1895) (wife can recover from contractor for chain-gang-related death of husband); *Dahlheim* v. *Lemon*, 45 F. 225, 228–230 (1891) (contractor liable for convict injuries); *Tillar* v. *Reynolds*, 96 Ark. 358, 360–361, 365–366, 131 S. W. 969, 970, 971–972 (1910) (work farm owner liable for inmate beating death); *Weigel* v. *Brown*, 194 F. 652 (CA8 1912) (prison contractor liable for unlawful whipping); see also *Edwards* v. *Pocahontas*, 47 F. 268 (CC Va. 1891) (inmate can recover from municipal corporation for injuries caused by poor jail conditions); *Hall* v. *O'Neil Turpentine Co.*, 56 Fla. 324, 47 So. 609 (1908) (private prison contractor and subcontractor liable to municipality for escaped prisoner under lease agreement); see generally Mancini, *supra* (discussing abuses of 19th-century private lease system). Yet, we have found no evidence that the law gave purely private companies or their employees any special immunity from such suits. Cf. *Almango* v. *Board of Supervisors of Albany County*, 32 N. Y. Sup. Ct. 551 (1881) (no cause of action against private contractor where contractor designated state instrumentality by statute). The case on which the dissent rests its argument, *Williams* v. *Adams*, 85 Mass. 171 (1861) (which could not—without more—prove the existence of such a tradition and does not, moreover, clearly involve a private prison operator) actually supports our point. It suggests that no immunity from suit would exist for the type of intentional conduct at issue in this case. See *ibid.* (were "battery" at issue, the case would be of a different "character" and "the defendant might be responsible"); see *id.*, at 176 (making clear that case only involves claim of ordinary negligence for lack of heat and other items, not "gross negligence," "implied malice," or "intention to do the prisoner any bodily injury"); cf. *Tower* v. *Glover*, 467 U. S. 914, 921 (1984) (concluding that state public defenders do not enjoy immunity from suit where conduct intentional and no history of immunity for intentional conduct was established).

Correctional functions in England have been more consistently public, see generally 22 Encyclopedia Brittanica, "Prison" 361–368 (11th ed. 1911); S. Webb & B. Webb, English Prisons Under Local Government (1922) (Webb), but historical sources indicate that England relied upon private jailers to manage the detention of prisoners from the Middle Ages until well into the 18th century. Shichor 21; see also Webb 4–5; 1 E. Coke, Institutes 43 (1797). The common law forbade those jailers to subject "'their prisoners to any pain or torment,'" whether through harsh confinement in leg irons, or otherwise. See *In re Birdsong,* 39 F. 599, 601 (SD Ga. 1889); 1 Coke, *supra,* at 315, 316, 381; 2 C. Addison, A Treatise on the Law of Torts § 1016, pp. 224–225 (1876); see also 4 Geo. IV, ch. 64, § X Twelfth. And it apparently authorized prisoner lawsuits to recover damages. 2 Addison, *supra,* § 1016. Apparently the law *did* provide a kind of immunity for certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign. See *Tower, supra,* at 921; J. Bishop, Commentaries on Non-Contract Law §§ 704, 710 (1889). But we have found no indication of any more general immunity that might have applied to private individuals working for profit.

Our research, including the sources that the parties have cited, reveals that in the 19th century (and earlier) sometimes private contractors and sometimes government itself carried on prison management activities. And we have found no conclusive evidence of a historical tradition of immunity for private parties carrying out these functions. History therefore does not provide significant support for the immunity claim. Cf. *Briscoe* v. *LaHue,* 460 U. S. 325, 330–334 (1983) (immunity for witnesses); *Pierson* v. *Ray,* 386 U. S. 547, 554–555 (1967) (immunity for judges and police officers); *Tenney* v. *Brandhove,* 341 U. S. 367, 372–376 (1951) (immunity for legislators).

C

Whether the immunity doctrine's *purposes* warrant immunity for private prison guards presents a closer question. *Wyatt,* consistent with earlier precedent, described the doctrine's purposes as protecting "government's ability to perform its traditional functions" by providing immunity where "necessary to preserve" the ability of government officials "to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service." 504 U. S., at 167. Earlier precedent described immunity as protecting the public from unwarranted timidity on the part of public officials by, for example, "encouraging the vigorous exercise of official authority," *Butz* v. *Economou,* 438 U. S. 478, 506 (1978), by contributing to "'principled and fearless decision-making,'" *Wood* v. *Strickland,* 420 U. S. 308, 319 (1975) (quoting *Pierson, supra,* at 554), and by responding to the concern that threatened liability would, in Judge Hand's words, "'dampen the ardour of all but the most resolute, or the most irresponsible,'" public officials, *Harlow,* 457 U. S., at 814 (quoting *Gregoire* v. *Biddle,* 177 F. 2d 579, 581 (CA2 1949) (L. Hand, J.), cert. denied, 339 U. S. 949 (1950); see also *Mitchell,* 472 U. S., at 526 (lawsuits may "distrac[t] officials from their governmental duties").

The guards argue that those purposes support immunity whether their employer is private or public. Brief for Petitioners 35–36. Since private prison guards perform the same work as state prison guards, they say, they must require immunity to a similar degree. To say this, however, is to misread this Court's precedents. The Court has sometimes applied a functional approach in immunity cases, but only to decide which type of immunity—absolute or qualified—a public officer should receive. See, *e. g., Buckley* v. *Fitzsimmons,* 509 U. S. 259 (1993); *Burns* v. *Reed,* 500 U. S. 478 (1991); *Forrester* v. *White,* 484 U. S. 219 (1988); *Cleavinger* v. *Saxner,* 474 U. S. 193 (1985); *Harlow, supra.* And it never has held that the mere performance of a governmental function could make the difference between unlimited § 1983 liability and qualified immunity, see, *e. g., Tower,* 467 U. S., at 922–923, especially for a private person who performs a job without government supervision or direction. Indeed a purely functional approach bristles with difficulty, particularly since, in many areas, government and private industry may engage in fundamentally similar activities, ranging from electricity production, to waste disposal, to even mail delivery.

Petitioners' argument also overlook certain important differences that, from an immunity perspective, are critical. First, the most important special government immunity-producing concern—unwarranted timidity—is less likely present, or at least is not special, when a private company subject to competitive market pressures operates a prison. Competitive pressures mean not only that a firm whose guards are too aggressive will face damages that raise costs, thereby threatening its replacement, but also that a firm whose guards are too timid will face threats of replacement by other firms with records that demonstrate their ability to do both a safer and a more effective job.

These ordinary marketplace pressures are present here. The private prison guards before us work for a large, multistate private prison management firm. C. Thomas, D. Bolinger, & J. Badalamenti, Private Adult Correctional Facility Census 1 (10th ed. 1997) (listing the Corrections Corporation of America as the largest prison management concern in the United States). The firm is systematically organized to perform a major administrative task for profit. Cf. Tenn. Code Ann. § 41–24–104 (Supp. 1996) (requiring that firms contracting with the State demonstrate a history of successful operation of correctional facilities). It performs that task independently, with relatively less ongoing direct state supervision. Compare § 41–4–140(c)(5) (exempting private jails from certain monitoring) with § 41–4–116 (requiring inspectors to examine publicly operated county jails once a month or more) and § 41–4–140(a) (requiring Tennessee Correctional Institute to inspect public correctional facilities on an annual basis and to report findings of such inspections). It must buy insurance sufficient to compensate victims of civil rights torts. § 41–24–107. And, since the firm's first contract expires after three years, § 41–24–105(a), its performance is disciplined, not only by state review, see §§ 41–24–105(c)–(f), 41–24–109, but also by pressure from potentially competing firms who can try to take its place. Cf. § 41–24–104(a)(4) (permitting State, upon notice, to cancel contract at any time after first year of operation); see also §§ 41–24–105(c) and (d) (describing standards for renewal of contract).

In other words, marketplace pressures provide the private firm with strong incentives to avoid overly timid, insufficiently vigorous, unduly fearful, or "nonarduous" employee job performance. And the contract's provisions—including those that might permit employee indemnification and avoid many civil-service restrictions—grant this private firm freedom to respond to those market pressures through rewards and penalties that operate directly upon its employees. See § 41–24–111. To this extent, the employees before us resemble those of other private firms and differ from government employees.

This is not to say that government employees, in their efforts to act within constitutional limits, will always, or often, sacrifice the otherwise effective performance of their duties. Rather, it is to say that government employees typically act within a *different* system. They work within a system that is responsible through elected officials to voters who, when they vote, rarely consider the performance of individual subdepartments or civil servants specifically and in detail. And that system is often characterized by multidepartment civil service rules that, while providing employee security, may limit the incentives or the ability of individual departments or supervisors flexibly to reward, or to punish, individual employees. Hence a judicial determination that "effectiveness" concerns warrant special immunity-type protection in respect to this latter (governmental) system does not prove its need in respect to the former. Consequently, we can find no *special* immunity-related need to encourage vigorous performance.

Second, "privatization" helps to meet the immunity-related need "to ensure that talented candidates" are "not deterred by the threat of damages suits from entering public service." *Wyatt,* 504 U. S., at 167; see also *Mitchell,* 472 U. S., at 526 (citing *Harlow,* 457 U. S., at 816). It does so in part because of the comprehensive insurance-coverage requirements just mentioned. The insurance increases the likelihood of employee indemnification and to that extent reduces the employment-discouraging fear of unwarranted liability potential applicants face. Because privatization law also frees the private prison-management firm from many civil service law restraints, Tenn. Code Ann. § 41–24–111 (1990), it permits the private firm, unlike a government department, to offset any increased employee liability risk with higher pay or extra benefits. In respect to this second government-immunity-related purpose then, it is difficult to find a *special* need for immunity, for the guards' employer can operate like other private firms; it need not operate like a typical government department.

Third, lawsuits may well " 'distrac[t]' " these employees " 'from their . . . duties,' " *Mitchell, supra,* at 526 (quoting *Harlow,* 457 U. S., at 816), but the risk of "distraction" alone cannot be sufficient grounds for an immunity. Our qualified immunity cases do not contemplate the complete elimination of lawsuit-based distractions. Cf. *id.,* at 818–819 (officials subject to suit for violations of clearly established rights). And it is significant that, here, Tennessee law reserves certain important discretionary tasks—those related to prison discipline, to parole, and to good time—for state officials.

Tenn. Code Ann. § 41–24–110 (1990). Given a continual and conceded need for deterring constitutional violations and our sense that the firm's tasks are not enormously different in respect to their importance from various other publicly important tasks carried out by private firms, we are not persuaded that the threat of distracting workers from their duties is enough virtually by itself to justify providing an immunity. Moreover, Tennessee, which has itself decided not to extend sovereign immunity to private prison operators (and arguably appreciated that this decision would increase contract prices to some degree), § 41–24–107, can be understood to have anticipated a certain amount of distraction.

D

Our examination of history and purpose thus reveals nothing special enough about the job or about its organizational structure that would warrant providing these private prison guards with a governmental immunity. The job is one that private industry might, or might not, perform; and which history shows private firms did sometimes perform without relevant immunities. The organizational structure is one subject to the ordinary competitive pressures that normally help private firms adjust their behavior in response to the incentives that tort suits provide—pressures not necessarily present in government departments. Since there are no special reasons significantly favoring an extension of governmental immunity, and since *Wyatt* makes clear that private actors are not *automatically* immune (*i. e.*, § 1983 immunity does not automatically follow § 1983 liability), we must conclude that private prison guards, unlike those who work directly for the government, do not enjoy immunity from suit in a § 1983 case. Cf. *Forrester* v. *White*, 484 U. S., at 224 (Officers "who seek exemption from personal liability have the burden of showing that such an exemption is justified"); see also *Butz*, 438 U. S., at 506.

III

We close with three caveats. First, we have focused only on questions of § 1983 immunity and have not addressed whether the defendants are liable under § 1983 even though they are employed by a private firm. Because the Court of Appeals assumed, but did not decide, § 1983 liability, it is for the District Court to determine whether, under this Court's decision in *Lugar* v. *Edmondson Oil Co.,* 457 U. S. 922 (1982), defendants actually acted "under color of state law."

Second, we have answered the immunity question narrowly, in the context in which it arose. That context is one in which a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertakes that task for profit and potentially in competition with other firms. The case does not involve a private individual briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision.

Third, *Wyatt* explicitly stated that it did not decide whether or not the private defendants before it might assert, not immunity, but a special "good-faith" defense. The Court said that it

> "d[id] not foreclose the possibility that private defendants faced with § 1983 liability under *Lugar* v. *Edmondson Oil Co.,* 457 U. S. 922 (1982), could be entitled to an affirmative defense based on good faith and/or probable cause or that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens." *Wyatt,* 504 U. S., at 169.

But because those issues were not fairly before the Court, it left "them for another day." *Ibid.* Similarly, the Court of Appeals in this case limited its holding to the question of immunity. It said specifically that it

> "may be that the appropriate balance to be struck here is to permit the correctional officers to assert a good

> faith defense, rather than qualified immunity. . . . However, that issue is not before this Court in this interlocutory appeal." 88 F. 3d, at 425.

Like the Court in *Wyatt*, and the Court of Appeals in this case, we do not express a view on this last-mentioned question.

For these reasons the judgment of the Court of Appeals is

Affirmed.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE THOMAS join, dissenting.

In *Procunier* v. *Navarette*, 434 U. S. 555 (1978), we held that state prison officials, including both supervisory and subordinate officers, are entitled to qualified immunity in a suit brought under 42 U. S. C. § 1983. Today the Court declares that this immunity is unavailable to employees of private prison management firms, who perform the same duties as state-employed correctional officials, who exercise the most palpable form of state police power, and who may be sued for acting "under color of state law." This holding is supported neither by common-law tradition nor public policy, and contradicts our settled practice of determining § 1983 immunity on the basis of the public function being performed.

I

The doctrine of official immunity against damages actions under § 1983 is rooted in the assumption that that statute did not abolish those immunities traditionally available at common law. See *Buckley* v. *Fitzsimmons*, 509 U. S. 259, 268 (1993). I agree with the Court, therefore, that we must look to history to resolve this case. I do not agree with the Court, however, that the petitioners' claim to immunity is defeated if they cannot provide an actual case, antedating or contemporaneous with the enactment of § 1983, in which immunity was successfully asserted by a private prison guard. It is only the absence of such a case, and not any explicit rejection of immunity by any common-law court, that the Court relies upon. The opinion observes that private jailers existed in the 19th century, and that they were successfully sued by prisoners. But one could just as easily show that government-employed jailers were successfully sued at common law, often with no mention of possible immunity, see Schellenger, Civil liability of sheriff or other officer charged with keeping jail or prison for death or injury of prisoner, 14 A. L. R. 2d 353 (1950) (annotating numerous cases where sheriffs were held liable). Indeed, as far as my research has disclosed, there may be more case-law support for immunity in the private-jailer context than in the government-jailer context. The only pre-§ 1983 jailer-immunity case of any sort that I am aware of is *Williams* v. *Adams,* 85 Mass. 171 (1861), decided only 10 years before § 1983 became law. And that case, which explicitly acknowledged that the issue of jailer immunity was "novel," *ibid., appears to have conferred immunity upon an independent contractor.*[1]

The truth to tell, *Procunier* v. *Navarette, supra,* which established § 1983 immunity for state prison guards, did not trouble itself with history, as our later § 1983 immunity opinions have done, see, *e. g., Burns* v. *Reed,* 500 U. S. 478, 489–490 (1991); *Tower* v. *Glover,* 467 U. S. 914, 920 (1984), but simply set forth a policy prescription. At this stage in our jurisprudence it is irrational, and productive of harmful policy consequences, to rely upon lack of case support to create an artificial limitation upon the scope of a doctrine (prison-guard immunity) that was itself not based on case support. I say an artificial limitation, because the historical *principles* on which common-law immunity was based, and which are reflected in our jurisprudence, plainly cover the private prison guard if they cover the nonprivate. Those principles are two: (1) immunity is determined by function, not status, and (2) even more specifically, private status is not disqualifying.

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[1] *Williams* held that prisoners could not recover damages for negligence against the master of a house of correction. That official seems to have been no more a "public officer" than the head of a private company running a prison. For example, the governing statute provided that he was to be paid by the prisoners for his expenses in supporting and employing them, and in event of their default he was given an action *indebitatus assumpsit* for the sum due, "which shall be deemed to be his own proper debt." Mass. Gen. Stat., ch. 143, § 15 (1835). If he failed to distribute to the prisoners those "rations or articles of food, soap, fuel, or other necessaries" directed by the county commissioner (or the mayor and aldermen of Boston), he was subject to a fine. *Id.,* § 45. The opinion in *Williams* says that "[t]he master of the house of correction is not an independent public officer, having the same relations to those who are confined therein that a deputy sheriff has to the parties to a writ committed to him to serve." 85 Mass., at 173.

"[O]ur cases clearly indicate that immunity analysis rests on functional categories, not on the status of the defendant." *Briscoe* v. *LaHue,* 460 U. S. 325, 342 (1983). Immunity "flows not from rank or title or 'location within the Government,' . . . but from the nature of the responsibilities of the individual official." *Cleavinger* v. *Saxner,* 474 U. S. 193, 201 (1985), quoting *Butz* v. *Economou,* 438 U. S. 478 (1978). "Running through our cases, with fair consistency, is a 'functional' approach to immunity questions . . . . Under that approach, we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions." *Forrester* v. *White,* 484 U. S. 219, 224 (1988). See also *Buckley, supra,* at 269; *Burns, supra,* at 484–486; *Malley* v. *Briggs,* 475 U. S. 335, 342–343 (1986); *Harlow* v. *Fitzgerald,* 457 U. S. 800, 810–811 (1982); *Imbler* v. *Pachtman,* 424 U. S. 409, 420–429 (1976). The parties concede that petitioners perform a prototypically governmental function (enforcement of state-imposed deprivation of liberty), and one that gives rise to qualified immunity.

The point that function rather than status governs the immunity determination is demonstrated in a prison-guard case virtually contemporaneous with the enactment of § 1983. *Alamango* v. *Board of Supervisors of Albany Cty.*, 32 N. Y. Sup. Ct. 551 (1881), held that supervisors charged under state law with maintaining a penitentiary were immune from prisoner lawsuits. Although they were not formally state officers, the court emphasized the irrelevance of this fact:

> "The duty of punishing criminals is inherent in the Sovereign power. It may be committed to agencies selected for that purpose, but such agencies, while engaged in that duty, stand so far in the place of the State and exercise its political authority, and do not act in any private capacity." *Id.*, at 552.[2]

Private individuals have regularly been accorded immunity when they perform a governmental function that qualifies. We have long recognized the absolute immunity of grand jurors, noting that like prosecutors and judges they must "exercise a discretionary judgment on the basis of evidence presented to them." *Imbler*, 424 U. S., at 423, n. 20. "It is the functional comparability of [grand jurors'] judgments to those of the judge that has resulted in [their] being referred to as 'quasi-judicial' officers, and their immunities being termed 'quasi-judicial' as well." *Ibid.* Likewise, witnesses who testify in court proceedings have enjoyed immunity, regardless of whether they were government employees. "[T]he common law," we have observed, "provided absolute immunity from subsequent damages liability for all persons—*governmental or otherwise*—who were integral parts of the judicial process." *Briscoe, supra,* at 335 (emphasis added). I think it highly unlikely that we would deny prosecutorial immunity to those private attorneys increasingly employed by various jurisdictions in this country to conduct high-visibility criminal prosecutions. See, *e. g.,* Kaplan, State Hires Private Lawyer for Bryant Family Trial, Los Angeles Times, Apr. 28, 1993, p. B4, col. 2; Estrich, On Building the Strongest Possible Prosecution Team, Los Angeles Times, July 10, 1994, p. M1, col. 1. There is no more reason for treating private prison guards differently.

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[2] The Court cites *Alamango* for the proposition that there is "no cause of action against [a] private contractor where [the] contractor [is] designated [a] state instrumentality by statute." *Ante*, at 406. The opinion in *Alamango*, however, does not cite any statutory designation of the supervisors as a "state instrumentality," and does not rely on such a designation for its holding. It does identify the Board of Supervisors as "a mere instrumentality selected by the State," 32 N. Y. Sup. Ct., at 552, but the same could be said of the prison management firm here (or the master of the house of corrections in *Williams* v. *Adams*, 85 Mass. 171 (1861), see n. 1, *supra*). If one were to accept the Court's distinguishing of this case, all that would be needed to change the outcome in the present suit is the pointless formality of designating the contractor a "state instrumentality"—hardly a rational resolution of the question before us.

II

Later in its opinion, the Court seeks to establish that there are policy reasons for denying to private prison guards the immunity accorded to public ones. As I have indicated above, I believe that history and not judicially analyzed policy governs this matter—but even on its own terms the Court's attempted policy distinction is unconvincing. The Court suggests two differences between civil-service prison guards and those employed by private prison firms which preclude any "special" need to give the latter immunity. First, the Court says that "unwarranted timidity" on the part of private guards is less likely to be a concern, since their companies are subject to market pressures that encourage them to be effective in the performance of their duties. If a private firm does not maintain a proper level of order, the Court reasons, it will be replaced by another one—so there is no need for qualified immunity to facilitate the maintenance of order.

This is wrong for several reasons. First of all, it is fanciful to speak of the consequences of "market" pressures in a regime where public officials are the only purchaser, and other people's money the medium of payment. Ultimately, one prison-management firm will be selected to replace another prison-management firm only if a decision is made by some *political* official not to renew the contract. See Tenn. Code Ann. §§41–24–103 to 105 (Supp. 1996). This is a government decision, not a market choice. If state officers turn out to be more strict in reviewing the cost and performance of privately managed prisons than of publically managed ones, it will only be because they have *chosen* to be so. The process can come to resemble a market choice only to the extent that political actors *will* such resemblance—that is, to the extent that political actors (1) are willing to pay attention to the issue of prison services, among the many issues vying for their attention, and (2) are willing to place considerations of cost and quality of service ahead of such political considerations as personal friendship, political alliances, in-state ownership of the contractor, etc. Secondly and more importantly, however, if one assumes a political regime that *is* bent on emulating the market in its purchase of prison services, it is almost certainly the case that, short of mismanagement so severe as to provoke a prison riot, *price* (not discipline) will be the predominating factor in such a regime's selection of a contractor. A contractor's price must depend upon its costs; lawsuits increase costs;[3] and "fearless" maintenance of discipline increases lawsuits. The incentive to down-play discipline will exist, moreover, even in those States where the politicians' zeal for market emulation and budget cutting has waned, and where prison-management contract renewal is virtually automatic: the more cautious the prison guards, the fewer the lawsuits, the higher the profits. In sum, it seems that "market-competitive" private prison managers have even greater need than civil-service prison managers for immunity as an incentive to discipline.

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[3] This is true even of successfully defended lawsuits, and even of lawsuits that have been insured against. The Court thinks it relevant to the factor I am currently discussing that the private prison-management firm "must buy insurance sufficient to compensate victims of civil rights torts," *ante*, at 410. Belief in the relevance of this factor must be traceable, ultimately, to belief in the existence of a free lunch. Obviously, as civil-rights claims increase, the cost of civil-rights insurance increases.

The Court's second distinction between state and private prisons is that privatization "helps to meet the immunity-related need to ensure that talented candidates are not deterred by the threat of damages suits from entering public service" as prison guards. *Ante,* at 411 (internal quotation marks omitted). This is so because privatization brings with it (or at least has brought with it in the case before us) (1) a statutory requirement for insurance coverage against civil-rights claims, which assertedly "increases the likelihood of employee indemnification," and (2) a liberation "from many civil service law restraints" which prevent increased employee risk from being "offset . . . with higher pay or extra benefits," *ibid.* As for the former (civil-rights liability insurance): surely it is the *availability* of that protection, rather than its actual presence in the case at hand, which decreases (if it does decrease, which I doubt) the *need* for immunity protection. (Otherwise, the Court would have to say that a private prison-management firm that is not required to purchase insurance, and does not do so, is more entitled to immunity; and that a government-run prison system that *does* purchase insurance is *less* entitled to immunity.) And of course civil-rights liability insurance is no less *available* to public entities than to private employers. But the second factor—liberation from civil-service limitations—is the more interesting one. First of all, simply as a philosophical matter it is fascinating to learn that one of the prime justifications for § 1983 immunity should be a phenomenon (civil-service laws) that did not even exist when § 1983 was enacted and the immunity created. Also as a philosophical matter, it is poetic justice (or poetic revenge) that the Court should use one of the principal economic benefits of "prison out-sourcing"—namely, the avoidance of civil-service salary and tenure encrustations—as the justification for a legal rule rendering out-sourcing more expensive. Of course the savings attributable to out-sourcing will not be wholly lost as a result of today's holding; they will be transferred in part from the public to prisoner-plaintiffs and to lawyers. It is a result that only the American Bar Association and the American Federation of Government Employees could love. But apart from philosophical fascination, this second factor is subject to the same objection as the first: governments *need not* have civil-service salary encrustations (or can exempt prisons from them); and hence governments, no more than private prison employers, have any *need* for § 1983 immunity.

There is one more possible rationale for denying immunity to private prison guards worth discussing, albeit briefly. It is a theory so implausible that the Court avoids mentioning it, even though it was the primary reason given in the Court of Appeals decision that the Court affirms. *McKnight* v. *Rees*, 88 F. 3d 417, 424–425 (CA6 1996). It is that officers of private prisons are more likely than officers of state prisons to violate prisoners' constitutional rights because they work for a profit motive, and hence an added degree of deterrence is needed to keep these officers in line. The Court of Appeals offered no evidence to support its bald assertion that private prison guards operate with different incentives than state prison guards, and gave no hint as to how prison guards might possibly increase their employers' profits by violating constitutional rights. One would think that private prison managers, whose § 1983 damages come out of their own pockets, as compared with public prison managers, whose § 1983 damages come out of the public purse, would, if anything, be more careful in training their employees to avoid constitutional infractions. And in fact, States having experimented with prison privatization commonly report that the overall caliber of the services provided to prisoners has actually improved in scope and quality. Matters Relating To The Federal Bureau Of Prisons: Hearing before the Subcommittee on Crime of the House Committee on the Judiciary, 104th Cong., 1st Sess., 110 (1995).

* * *

In concluding, I must observe that since there is no apparent *reason*, neither in history nor in policy, for making immunity hinge upon the Court's distinction between public and private guards, the precise *nature* of that distinction must also remain obscure. Is it privity of contract that separates the two categories—so that guards paid directly by the State are "public" prison guards and immune, but those paid by a prison-management company "private" prison guards and not immune? Or is it rather "employee" versus "independent contractor" status—so that even guards whose compensation is paid directly by the State are not immune if they are not also supervised by a state official? Or is perhaps state supervision alone (without direct payment) enough to confer immunity? Or is it (as the Court's characterization of *Alamango*, see n. 2, *supra*, suggests) the formal designation of the guards, or perhaps of the guards' employer, as a "state instrumentality" that makes the difference? Since, as I say, I see no sense in the public-private distinction, neither do I see what precisely it consists of.

Today's decision says that two sets of prison guards who are indistinguishable in the ultimate source of their authority over prisoners, indistinguishable in the powers that they possess over prisoners, and indistinguishable in the duties that they owe toward prisoners, are to be treated quite differently in the matter of their financial liability. The only sure effect of today's decision—and the only purpose, as far as I can tell—is that it will artificially raise the cost of privatizing prisons. Whether this will cause privatization to be prohibitively expensive, or instead simply divert state funds that could have been saved or spent on additional prison services, it is likely that taxpayers and prisoners will suffer as a consequence. Neither our precedent, nor the historical foundations of § 1983, nor the policies underlying § 1983, support this result.

I respectfully dissent.

METRO-NORTH COMMUTER RAILROAD CO. *v.* BUCKLEY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 96–320. Argued February 18, 1997—Decided June 23, 1997

Respondent Buckley was exposed to insulation dust containing asbestos while employed as a pipefitter by petitioner railroad. Since attending an asbestos awareness class, he has feared, with some cause, that he will develop cancer. Thus far, periodic medical checkups have revealed no evidence of asbestos-related disease. Buckley filed suit under the Federal Employers' Liability Act (FELA)—which permits a railroad worker to recover for an "injury . . . resulting from" his employer's "negligence," 45 U. S. C. § 51—seeking damages for negligently inflicted emotional distress and to cover the cost of future checkups. The District Court dismissed the suit after hearing Buckley's case, finding that, because there had been no physical impact from his exposure, the FELA did not permit recovery for his emotional injury. See *Consolidated Rail Corporation* v. *Gottshall,* 512 U. S. 532. It did not discuss his medical monitoring claim. In reversing, the Second Circuit held that his contact with the insulation dust was what the *Gottshall* Court had called a "physical impact" that, when present, permits a FELA plaintiff to recover for accompanying emotional distress, and that he could also recover the costs of checkups made necessary by the exposure.

Held:

1. Buckley cannot recover emotional distress damages unless, and until, he manifests symptoms of a disease. Pp. 428–438.

(a) The critical issue is whether Buckley's physical contact with insulation dust amounts to a "physical impact" as that term was used in *Gottshall,* an emotional distress case. In interpreting the word "injury" in FELA § 1, the *Gottshall* Court set forth several general legal principles applicable here: The FELA's purpose is basically humanitarian; the FELA expressly abolishes or modifies a host of common-law limitations on recovery; it should be interpreted liberally, but liability rests upon negligence and the railroad is not an insurer for all employee injuries; and those common-law principles not rejected in the statute's text are entitled to great weight in interpreting the FELA and play a significant role in determining whether, or when, an employee can recover damages for negligently inflicted emotional distress. The Court also identified more specific legal propositions: The common law of torts does not permit recovery for negligently inflicted emotional distress *unless* the distress falls within specific categories that amount to recovery-permitting exceptions; and FELA § 1, mirroring many States' law, allows recovery for such distress where a plaintiff satisfies the common law's "zone of danger" test, which permits plaintiffs to recover for emotional injury if they *sustain a physical impact* from, or are placed in immediate risk of physical harm by, a defendant's negligence. Pp. 428–430.

(b) The "physical impact" to which *Gottshall* referred does not include a simple physical contact with a substance that might cause a disease at a substantially later time—where that substance, or related circumstance, threatens no harm other than that disease-related risk. First, each of the many state cases that *Gottshall* cited in support of the "zone of danger" test involved a threatened physical contact that caused, or might have caused, immediate traumatic harm. Second, *Gottshall*'s language, read in light of this precedent, seems similarly limited. Third, with only a few exceptions, common-law courts have denied recovery for emotional distress to plaintiffs who, like Buckley, are disease and symptom free. Fourth, general policy reasons to which *Gottshall* referred in explaining why common-law courts have restricted recovery for certain classes of negligently caused harms, see 512 U. S., at 557, are present in this case. Thus, there is no legal basis for adopting the Second Circuit's emotional distress recovery rule. Pp. 430–436.

(c) Buckley's several arguments in reply—that his evidence of exposure and enhanced mortality risk is as strong a proof as an accompanying physical symptom of genuine emotional distress, that a series of common-law cases support his position, and that the FELA's "humanitarian" nature warrants a holding in his favor—are unpersuasive. Pp. 436–438.

2. Buckley has not shown that he is legally entitled to recover medical monitoring costs. Insofar as the Second Circuit's opinion suggests it intended to apply the basic damages law principle that a plaintiff can recover medical expenses reasonably related to an underlying injury, the holding that the emotional distress here is not a compensable injury also requires reversal on this point. Insofar as the court rested its holding upon the broader ground that medical monitoring costs themselves represent a separate negligently caused economic injury for which FELA recovery is possible, it suggests the existence of a tort law cause of action permitting the recovery of medical cost damages in a lump sum and irrespective of insurance, a holding beyond the bounds of the "evolving common law" as it currently stands. *Gottshall, supra,* at 558. The cases authorizing recovery for medical monitoring for asymptomatic plaintiffs do not endorse such a full-blown, traditional tort law cause of action, but have instead suggested, or imposed, special limita-

tions on that remedy. Given the mix of competing general policy considerations identified in *Gottshall,* Buckley's policy-based arguments that the FELA contains such an *unqualified* tort liability rule are unconvincing. Pp. 438–444.

79 F. 3d 1337, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. GINSBURG, J., filed an opinion concurring in the judgment in part and dissenting in part, in which STEVENS, J., joined, *post,* p. 444.

Sheila L. Birnbaum argued the cause for petitioner. With her on the briefs were *Barbara Wrubel, Douglas W. Dunham, Ellen P. Quackenbos,* and *Richard K. Bernard.*

Charles C. Goetsch argued the cause for respondent. With him on the brief were *George J. Cahill, Jr.,* and *John G. DiPersia.**

JUSTICE BREYER delivered the opinion of the Court.

The basic question in this case is whether a railroad worker negligently exposed to a carcinogen (here, asbestos) but without symptoms of any disease can recover under the

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*Briefs of *amici curiae* urging reversal were filed for the Port Authority of New York and New Jersey by *Milton H. Pachter, Arthur P. Berg,* and *Anne M. Tannenbaum;* for the American Insurance Association by *Kenneth W. Starr* and *Craig A. Berrington;* for the American Tort Reform Association by *Victor E. Schwartz, Mark A. Behrens,* and *Sherman Joyce;* for the Association of American Railroads by *Robert W. Blanchette* and *Ralph G. Wellington;* for the Chemical Manufacturers Association et al. by *Steven R. Kuney, Donald D. Evans, Stephen A. Bokat,* and *Robin S. Conrad;* for the Defense Research Institute et al. by *James M. Doran, Jr., Jan S. Amundson,* and *Quentin Riegel;* for Owens Corning by *Anne E. Cohen;* for Owens-Illinois, Inc., by *W. Donald McSweeney;* for the Product Liability Advisory Council, Inc., by *Robert N. Weiner;* and for the Washington Legal Foundation by *Daniel J. Popeo* and *Penelope Kilburn Shapiro.*

Briefs of *amici curiae* urging affirmance were filed for the Association of Trial Lawyers of America et al. by *Ronald Simon, Jeffrey R. White,* and *Howard F. Twiggs;* for the International Association of Machinists and Aerospace Workers et al. by *Michael L. Rustad;* and for the Rail Labor Executive Association by *Richard N. Pearson.*

Federal Employers' Liability Act (FELA or Act), 35 Stat. 65, as amended, 45 U. S. C. § 51 *et seq.*, for negligently inflicted emotional distress. We conclude that the worker before us here cannot recover unless, and until, he manifests symptoms of a disease. We also consider a related claim for medical monitoring costs, and we hold, for reasons set out below, that the respondent in this case has not shown that he is legally entitled to recover those costs.

I

Respondent, Michael Buckley, works as a pipefitter for Metro-North, a railroad. For three years (1985–1988) his job exposed him to asbestos for about one hour per working day. During that time Buckley would remove insulation from pipes, often covering himself with insulation dust that contained asbestos. Since 1987, when he attended an "asbestos awareness" class, Buckley has feared that he would develop cancer—and with some cause, for his two expert witnesses testified that, even after taking account of his now-discarded 15-year habit of smoking up to a pack of cigarettes per day, the exposure created an *added* risk of death due to cancer, or to other asbestos-related diseases, of either 1% to 5% (in the view of one of plaintiff's experts), or 1% to 3% (in the view of another). Since 1989, Buckley has received periodic medical checkups for cancer and asbestosis. So far, those checkups have not revealed any evidence of cancer or any other asbestos-related disease.

Buckley sued Metro-North under the FELA, a statute that permits a railroad worker to recover for an "injury . . . resulting . . . from" his employer's "negligence." 45 U. S. C. § 51. He sought damages for his emotional distress and to cover the cost of future medical checkups. His employer conceded negligence, but it did not concede that Buckley had actually suffered emotional distress, and it argued that the FELA did not permit a worker like Buckley, who had suffered no physical harm, to recover for injuries of either sort.

After hearing Buckley's case, the District Court dismissed the action. The court found that Buckley did not "offer sufficient evidence to allow a jury to find that he suffered a real emotional injury." App. 623. And, in any event, Buckley suffered no "physical impact"; hence any emotional injury fell outside the limited set of circumstances in which, according to this Court, the FELA permits recovery. *Id.*, at 620; see *Consolidated Rail Corporation* v. *Gottshall,* 512 U. S. 532 (1994). The District Court did not discuss Buckley's further claim for the costs of medical monitoring.

Buckley appealed, and the Second Circuit reversed. 79 F. 3d 1337 (1996). Buckley's evidence, it said, showed that his contact with the insulation dust (containing asbestos) was "massive, lengthy, and tangible," *id.*, at 1345, and that the contact "would cause fear in a reasonable person," *id.*, at 1344. Under these circumstances, the court held, the contact was what this Court in *Gottshall* had called a "physical impact"—a "physical impact" that, when present, permits a FELA plaintiff to recover for accompanying emotional distress. The Second Circuit also found in certain of Buckley's workplace statements sufficient expression of worry to permit sending his emotional distress claim to a jury. Finally, the court held that Buckley could recover for the costs of medical checkups because the FELA permits recovery of all reasonably incurred extra medical monitoring costs whenever a "reasonable physician would prescribe . . . a monitoring regime different than the one that would have been prescribed in the absence of" a particular negligently caused exposure to a toxic substance. 79 F. 3d, at 1347 (internal quotation marks omitted).

We granted certiorari to review the Second Circuit's holdings in light of *Gottshall.*

II

The critical question before us in respect to Buckley's "emotional distress" claim is whether the physical contact with insulation dust that accompanied his emotional distress amounts to a "physical impact" as this Court used that term in *Gottshall.* In *Gottshall,* an emotional distress case, the Court interpreted the word "injury" in FELA § 1, a provision that makes "[e]very common carrier by railroad . . . liable in damages to any person suffering injury while . . . employed" by the carrier if the "injury" results from carrier "negligence." 45 U. S. C. § 51. In doing so, it initially set forth several general legal principles applicable here. *Gottshall* described FELA's purposes as basically "humanitarian." *Gottshall, supra,* at 542; see also, *e. g., Urie* v. *Thompson,* 337 U. S. 163 (1949). It pointed out that the Act expressly abolishes or modifies a host of common-law doctrines that previously had limited recovery. See, *e. g.,* 45 U. S. C. §§ 51, 53, and 54. It added that this Court has interpreted the Act's language "liberally" in light of its humanitarian purposes. *Gottshall, supra,* at 543. But, at the same time, the Court noted that liability under the Act rests upon "negligence" and that the Act does not make the railroad " 'the insurer' " for all employee injuries. 512 U. S., at 543 (quoting *Ellis* v. *Union Pacific R. Co.,* 329 U. S. 649, 653 (1947)). The Court stated that "common-law principles," where not rejected in the text of the statute, "are entitled to great weight" in interpreting the Act, and that those principles "play a significant role" in determining whether, or when, an employee can recover damages for "negligent infliction of emotional distress." 512 U. S., at 544. See also *id.,* at 558 (SOUTER, J., concurring) (Court's duty "in interpreting FELA . . . is to develop a federal common law of negligence . . . informed by reference to the evolving common law"); *Atchison, T. & S. F. R. Co.* v. *Buell,* 480 U. S. 557 (1987).

The Court also set forth several more specific legal propositions. It recognized that the common law of torts does not permit recovery for negligently inflicted emotional distress *unless* the distress falls within certain specific categories that amount to recovery-permitting exceptions. The law, for example, does permit recovery for emotional distress where that distress accompanies a physical injury, see, *e. g.*, *Simmons* v. *Pacor, Inc.*, 543 Pa. 664, 678, 674 A. 2d 232, 239 (1996); Restatement (Second) of Torts § 924(a) (1977), and it often permits recovery for distress suffered by a close relative who witnesses the physical injury of a negligence victim, *e. g.*, *Dillon* v. *Legg*, 68 Cal. 2d 728, 441 P. 2d 912 (1968); *Gottshall*, 512 U. S., at 549, n. 10 (citing cases). The Court then held that FELA § 1, mirroring the law of many States, sometimes permitted recovery "for damages for negligent infliction of emotional distress," *id.*, at 550, and, in particular, it does so where a plaintiff seeking such damages satisfies the common law's "zone of danger" test. It defined that test by stating that the law permits "recovery for emotional injury" by

> "those plaintiffs who *sustain a physical impact* as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." *Id.*, at 547–548 (emphasis added).

The case before us, as we have said, focuses on the italicized words "physical impact." The Second Circuit interpreted those words as including a simple physical contact with a substance that might cause a disease at a future time, so long as the contact was of a kind that would "cause fear in a reasonable person." 79 F. 3d, at 1344. In our view, however, the "physical impact" to which *Gottshall* referred does not include a simple physical contact with a substance that might cause a disease at a substantially later time—where that substance, or related circumstance, threatens no harm other than that disease-related risk.

First, *Gottshall* cited many state cases in support of its adoption of the "zone of danger" test quoted above. And in each case where recovery for emotional distress was permitted, the case involved a threatened physical contact that caused, or might have caused, immediate traumatic harm.

Keck v. *Jackson*, 122 Ariz. 114, 593 P. 2d 668 (1979) (car accident); *Towns* v. *Anderson*, 195 Colo. 517, 579 P. 2d 1163 (1978) (gas explosion); *Robb* v. *Pennsylvania R. Co.*, 58 Del. 454, 210 A. 2d 709 (1965) (train struck car); *Rickey* v. *Chicago Transit Authority*, 98 Ill. 2d 546, 457 N. E. 2d 1 (1983) (clothing caught in escalator choked victim); *Shuamber* v. *Henderson*, 579 N. E. 2d 452 (Ind. 1991) (car accident); *Watson* v. *Dilts*, 116 Iowa 249, 89 N. W. 1068 (1902) (intruder assaulted plaintiff's husband); *Stewart* v. *Arkansas Southern R. Co.*, 112 La. 764, 36 So. 676 (1904) (train accident); *Purcell* v. *St. Paul City R. Co.*, 48 Minn. 134, 50 N. W. 1034 (1892) (near streetcar collision); *Bovsun* v. *Sanperi*, 61 N. Y. 2d 219, 461 N. E. 2d 843 (1984) (car accident); *Kimberly* v. *Howland*, 143 N. C. 398, 55 S. E. 778 (1906) (rock from blasting crashed through plaintiffs' residence); *Simone* v. *Rhode Island Co.*, 28 R. I. 186, 66 A. 202 (1907) (streetcar collision); *Mack* v. *South-Bound R. Co.*, 52 S. C. 323, 29 S. E. 905 (1898) (train narrowly missed plaintiff); *Gulf, C. & S. F. R. Co.* v. *Hayter*, 93 Tex. 239, 54 S. W. 944 (1900) (train collision); *Pankopf* v. *Hinkley*, 141 Wis. 146, 123 N. W. 625 (1909) (automobile struck carriage); *Garrett* v. *New Berlin*, 122 Wis. 2d 223, 362 N. W. 2d 137 (1985) (car accident). Cf. *Deutsch* v. *Shein*, 597 S. W. 2d 141 (Ky. 1980) (holding that exposure to X rays was "physical contact" supporting recovery for emotional suffering where immediate physical harm to fetus was suspected).

Second, *Gottshall's* language, read in light of this precedent, seems similarly limited. 512 U. S., at 555 ("zone of danger test . . . is consistent with FELA's central focus on physical perils"); *id.*, at 556 (quoting *Lancaster* v. *Norfolk & Western R. Co.*, 773 F. 2d 807, 813 (CA7 1985)) (FELA seeks to protect workers " 'from physical invasions or menaces' "), cert. denied, 480 U. S. 945 (1987); 512 U. S., at 556 (employer should be liable for "emotional injury caused by the apprehension of physical impact"); *id.*, at 547–548 (quoting Pearson, Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules, 34 U. Fla. L. Rev. 477, 488–489 (1982)) ("'[T]hose within the zone of danger of physical impact'" should be able to "'recover for fright'" because "'a near miss may be as frightening as a direct hit'").

Taken together, language and cited precedent indicate that the words "physical impact" do not encompass every form of "physical contact." And, in particular, they do not include a contact that amounts to no more than an exposure—an exposure, such as that before us, to a substance that poses some future risk of disease and which contact causes emotional distress only because the worker learns that he may become ill after a substantial period of time.

Third, common-law precedent does not favor the plaintiff. Common-law courts do permit a plaintiff who suffers from a disease to recover for related negligently caused emotional distress, see *supra,* at 429, and some courts permit a plaintiff who exhibits a physical symptom of exposure to recover, see, *e. g., Herber* v. *Johns-Manville Corp.,* 785 F. 2d 79, 85 (CA3 1986); *Mauro* v. *Owens-Corning Fiberglas Corp.,* 225 N. J. Super. 196, 542 A. 2d 16 (App. Div. 1988). But with only a few exceptions, common-law courts have denied recovery to those who, like Buckley, are disease and symptom free. *E. g., Burns* v. *Jacquays Mining Corp.,* 156 Ariz. 375, 752 P. 2d 28 (Ct. App. 1987), review dism'd, 162 Ariz. 186, 781 P. 2d 1373 (1989); *Mergenthaler* v. *Asbestos Corp. of Am.,* 480 A. 2d 647 (Del. 1984); *Eagle-Picher Industries, Inc.* v. *Cox,* 481 So. 2d 517 (Fla. App. 1985), review denied, 492 So. 2d 1331 (Fla. 1986); *Capital Holding Corp.* v. *Bailey,* 873 S. W. 2d 187 (Ky. 1994); *Payton* v. *Abbott Labs,* 386 Mass. 540, 437 N. E. 2d 171 (1982); *Simmons* v. *Pacor, Inc.,* 543 Pa. 664, 674 A. 2d 232 (1996); *Ball* v. *Joy Technologies, Inc.,* 958 F. 2d 36 (CA4 1991); *Deleski* v. *Raymark Industries, Inc.,* 819 F. 2d 377 (CA3 1987) (Pennsylvania and New Jersey law); *Adams* v. *Johns-Manville Sales Corp.,* 783 F. 2d 589 (CA5 1986) (Louisiana law); *Wisniewski* v. *Johns-Manville Corp.,* 759 F. 2d 271 (CA3 1985) (Pennsylvania law); *In re Hawaii Federal*

Asbestos Cases, 734 F. Supp. 1563 (Haw. 1990) (Hawaii law); *Amendola* v. *Kansas City So. R. Co.*, 699 F. Supp. 1401 (WD Mo. 1988) (FELA); see also *Potter* v. *Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 863 P. 2d 795 (1993) (in banc) (no recovery for fear of cancer in a negligence action unless plaintiff is "more likely than not" to develop cancer).

Fourth, the general policy reasons to which *Gottshall* referred—in its explanation of why common-law courts have restricted recovery for emotional harm to cases falling within rather narrowly defined categories—militate against an expansive definition of "physical impact" here. Those reasons include: (a) special "difficult[y] for judges and juries" in separating valid, important claims from those that are invalid or "trivial," *Gottshall*, 512 U. S., at 557; (b) a threat of "unlimited and unpredictable liability," *ibid.;* and (c) the "potential for a flood" of comparatively unimportant, or "trivial," claims, *ibid.*

To separate meritorious and important claims from invalid or trivial claims does not seem easier here than in other cases in which a plaintiff might seek recovery for typical negligently caused emotional distress. The facts before us illustrate the problem. The District Court, when concluding that Buckley had failed to present "sufficient evidence to allow a jury to find . . . a real emotional injury," pointed out that, apart from Buckley's own testimony, there was virtually no evidence of distress. App. 623–625. Indeed, Buckley continued to work with insulating material "even though . . . he could have transferred" elsewhere, he "continued to smoke cigarettes" despite doctors' warnings, and his doctor did not refer him "either to a psychologist or to a social worker." *Id.*, at 624. The Court of Appeals reversed because it found certain objective corroborating evidence, namely, "workers' complaints to supervisors and investigative bodies." 79 F. 3d, at 1346. Both kinds of "objective" evidence—the confirming and disconfirming evidence—seem only indirectly related to the question at issue, the existence and seriousness of Buckley's claimed emotional distress. Yet, given the difficulty of separating valid from invalid emotional injury claims, the evidence before us may typify the kind of evidence to which parties and the courts would have to look.

The Court in *Gottshall* made a similar point:

> "[T]esting for the 'genuineness' of an injury alone . . . would be bound to lead to haphazard results. Judges would be forced to make highly subjective determinations concerning the authenticity of claims for emotional injury, which are far less susceptible to objective medical proof than are their physical counterparts. To the extent the genuineness test could limit potential liability, it could do so only inconsistently." 512 U. S., at 552.

And JUSTICE GINSBURG, too, in her opinion concurring in the judgment in part and dissenting in part, seems to recognize this problem, for she would limit recovery in emotional injury cases to those who can show more objective evidence than simply having expressed fear and concern to supervisors. See *post,* at 445.

More important, the physical contact at issue here—a simple (though extensive) contact with a carcinogenic substance—does not seem to offer much help in separating valid from invalid emotional distress claims. That is because contacts, even extensive contacts, with serious carcinogens are common. See, *e. g.,* Nicholson, Perkel, & Selikoff, Occupational Exposure to Asbestos: Population at Risk and Projected Mortality—1980–2030, 3 Am. J. Indust. Med. 259 (1982) (estimating that 21 million Americans have been exposed to work-related asbestos); U. S. Dept. of Health and Human Services, 1 Seventh Annual Report on Carcinogens 71 (1994) (3 million workers exposed to benzene, a majority of Americans exposed outside the workplace); Pirkle, et al., Exposure of the U S Population to Environmental Tobacco Smoke, 275 JAMA 1233, 1237 (1996) (reporting that 43% of

American children lived in a home with at least one smoker, and 37% of adult nonsmokers lived in a home with at least one smoker or reported environmental tobacco smoke at work). They may occur without causing serious emotional distress, but sometimes they do cause distress, and reasonably so, for cancer is both an unusually threatening and unusually frightening disease. See Statistical Abstract of United States 94 (1996) (23.5% of Americans who died in 1994 died of cancer); American Cancer Society, Cancer Facts & Figures—1997, p. 1 (half of all men and one-third of all women will develop cancer). The relevant problem, however, remains one of evaluating a claimed emotional reaction to an *increased* risk of dying. An external circumstance—exposure—makes some emotional distress more likely. But how can one determine from the external circumstance of exposure whether, or when, a claimed strong emotional reaction to an *increased* mortality risk (say, from 23% to 28%) is reasonable and genuine, rather than overstated—particularly when the relevant statistics themselves are controversial and uncertain (as is usually the case), and particularly since neither those exposed nor judges or juries are experts in statistics? The evaluation problem seems a serious one.

The large number of those exposed and the uncertainties that may surround recovery also suggest what *Gottshall* called the problem of "unlimited and unpredictable liability." Does such liability mean, for example, that the costs associated with a rule of liability would become so great that, given the nature of the harm, it would seem unreasonable to require the public to pay the higher prices that may result? Cf. Priest, The Current Insurance Crisis and Modern Tort Law, 96 Yale L. J. 1521, 1585–1587 (1987). The same characteristics further suggest what *Gottshall* called the problem of a "flood" of cases that, if not "trivial," are comparatively less important. In a world of limited resources, would a rule permitting immediate large-scale recoveries for widespread emotional distress caused by fear of future disease diminish the likelihood of recovery by those who later suffer from the disease? Cf. J. Weinstein, Individual Justice in Mass Tort Litigation 10–11, 141 (1995); Schuck, The Worst Should Go First: Deferral Registries in Asbestos Litigation, 15 Harv. J. L. & Pub. Pol'y 541 (1992).

We do not raise these questions to answer them (for we do not have the answers), but rather to show that general policy concerns of a kind that have led common-law courts to deny recovery for certain classes of negligently caused harms are present in this case as well. That being so, we cannot find in *Gottshall's* underlying rationale any basis for departing from *Gottshall's* language and precedent or from the current common-law consensus. That is to say, we cannot find in *Gottshall's* language, cited precedent, other common-law precedent, or related concerns of policy a legal basis for adopting the emotional distress recovery rule adopted by the Court of Appeals.

Buckley raises several important arguments in reply. He points out, for example, that common-law courts do permit recovery for emotional distress where a plaintiff has physical symptoms; and he argues that his evidence of exposure and enhanced mortality risk is as strong a proof as an accompanying physical symptom that his emotional distress is genuine.

This argument, however, while important, overlooks the fact that the common law in this area does not examine the genuineness of emotional harm case by case. Rather, it has developed recovery-permitting categories the contours of which more distantly reflect this, and other, abstract general policy concerns. The point of such categorization is to deny courts the authority to undertake a case-by-case examination. The common law permits emotional distress recovery for that category of plaintiffs who suffer from a disease (or exhibit a physical symptom), for example, thereby finding a special effort to evaluate emotional symptoms warranted in that category of cases—perhaps from a desire to make a physically injured victim whole or because the parties are likely to be in court in any event. In other cases, however, falling outside the special recovery-permitting categories, it has reached a different conclusion. The relevant question here concerns the validity of a rule that seeks to redefine such a category. It would not be easy to redefine "physical impact" in terms of a rule that turned on, say, the "massive, lengthy, [or] tangible" nature of a contact that amounted to an exposure, whether to contaminated water, or to germ-laden air, or to carcinogen-containing substances, such as insulation dust containing asbestos. But, in any event, for the reasons we have stated, *supra,* at 430–436, we cannot find that the common law has done so.

Buckley also points to a series of common-law cases that he believes offer him support. Many of these cases, however, find that the plaintiff at issue fell within a category where the law already permitted recovery for emotional distress. *E. g., Marchica* v. *Long Island R. Co.,* 31 F. 3d 1197 (CA2 1994) (traumatic injury); *Clark* v. *Taylor,* 710 F. 2d 4 (CA1 1983) (intentional infliction of harm); *Laxton* v. *Orkin Exterminating Co.,* 639 S. W. 2d 431, 433–434 (Tenn. 1982) (nuisance claim); *Lavelle* v. *Owens-Corning Fiberglas Corp.,* 30 Ohio Misc. 2d 11, 507 N. E. 2d 476 (Ct. Common Pleas, Cayahoga Cty. 1987) (emotional distress damages sought by asbestosis-afflicted plaintiff). We have found only three asbestos-related cases, all involving state law, that support Buckley directly. *Watkins* v. *Fibreboard Corp.,* 994 F. 2d 253, 259 (CA5 1993) (Texas law) (recognizing cause of action for emotional distress based on exposures to asbestos in the absence of physical symptoms); *In re Moorenovich,* 634 F. Supp. 634 (Me. 1986) (Maine law) (same); *Gerardi* v. *Nuclear Utility Services, Inc.,* 149 Misc. 2d 657, 566 N. Y. S. 2d 1002 (Westchester Cty. 1991) (same). None of them was decided by the highest court of the relevant State. And we do not find that minority view a sufficient basis for reaching Buckley's proposed conclusion.

Finally, Buckley argues that the "humanitarian" nature of the FELA warrants a holding in his favor. We do not doubt that the FELA's purpose militates in favor of recovery for a serious and negligently caused emotional harm. Cf. *Gottshall*, 512 U. S., at 550. But just as courts must interpret that law to take proper account of the harms suffered by a sympathetic individual plaintiff, so they must consider the general impact, on workers as well as employers, of the general liability rules they would thereby create. Here the relevant question concerns not simply recovery in an individual case, but the consequences and effects of *a rule of law that would permit that recovery*. And if the common law concludes that a legal rule permitting recovery here, from a tort law perspective, and despite benefits in *some* individual cases, would on balance cause more harm than good, and if we find that judgment reasonable, we cannot find that conclusion inconsistent with the FELA's humanitarian purpose.

III

Buckley also sought recovery for a different kind of "injury," namely, the economic cost of the extra medical checkups that he expects to incur as a result of his exposure to asbestos-laden insulation dust. The District Court, when it dismissed the action, did not discuss this aspect of Buckley's case. But the Second Circuit, when reversing the District Court, held that "a reasonable jury could award" Buckley the "costs" of "medical monitoring" in this case. 79 F. 3d, at 1347. We agreed to decide whether the court correctly found that the FELA permitted a plaintiff without symptoms or disease to recover this economic loss.

The parties do not dispute—and we assume—that an exposed plaintiff can recover related reasonable medical monitoring costs if and when he develops symptoms. As the Second Circuit pointed out, a plaintiff injured through negligence can recover related reasonable medical expenses as an element of damages. *Ibid.* (citing C. McCormick, Law of

Damages § 90 (1935)); see also Restatement (Second) of Torts § 924(c) (1977); J. Stein, Stein on Personal Injury Damages § 5.18 (2d ed. 1991). No one has argued that any different principle would apply in the case of a plaintiff whose "injury" consists of a disease, a symptom, or those sorts of emotional distress that fall within the FELA's definition of "injury." See Part II, *supra*. Much of the Second Circuit's opinion suggests it intended only to apply this basic principle of the law of damages. See, *e. g.*, 79 F. 3d, at 1342 ("[T]his case turns upon whether . . . emotional harm . . . is an injury compensable under FELA"); *id.*, at 1347 (monitoring costs are a "traditional element of tort damages"). Insofar as that is so, Part II of our opinion, holding that the emotional distress at issue here is not a compensable "injury," requires reversal on this point as well.

Other portions of the Second Circuit's opinion, however, indicate that it may have rested this portion of its decision upon a broader ground, namely, that medical monitoring costs themselves represent a separate negligently caused economic "injury," 45 U. S. C. § 51, for which a negligently exposed FELA plaintiff (including a plaintiff without disease or symptoms) may recover to the extent that the medical monitoring costs that a reasonable physician would prescribe for the plaintiff exceed the medical monitoring costs that "would have been prescribed in the absence of [the] exposure." 79 F. 3d, at 1347 (citation omitted). This portion of the opinion, when viewed in light of Buckley's straightforward claim for an "amount of money" sufficient to "compensate" him for "future medical monitoring expenses," Plaintiff's Proposed Charges to the Jury 25, Record, Doc. 33, suggests the existence of an ordinary, but separate, tort law cause of action permitting (as tort law ordinarily permits) the recovery of medical cost damages in the form of a lump sum, see Stein, *supra*, at §§ 5.1 and 5.18, and irrespective of insurance, Restatement (Second) of Torts, *supra*, § 920A(2). As so characterized, the Second Circuit's holding, in our view, went beyond the bounds of currently "evolving common law." *Gottshall, supra,* at 558 (SOUTER, J., concurring).

Guided by the parties' briefs, we have canvassed the state-law cases that have considered whether the negligent causation of this kind of harm (*i. e.,* causing a plaintiff, through negligent exposure to a toxic substance, to incur medical monitoring costs) by itself constitutes a sufficient basis for a tort recovery. We have found no other FELA decisions. We have put to the side several cases that involve special recovery-permitting circumstances, such as the presence of a traumatic physical impact, or the presence of a physical symptom, which for reasons explained in Part II are important but beside the point here. See, *e. g., Friends for All Children, Inc.* v. *Lockheed Aircraft Corp.,* 746 F. 2d 816, 824–825 (CADC 1984) (traumatic impact); *Hagerty* v. *L & L Marine Services, Inc.,* 788 F. 2d 315, modified, 797 F. 2d 256 (CA5 1986) (same); *Simmons* v. *Pacor, Inc.,* 543 Pa. 664, 674 A. 2d 232 (1996) (physical symptom). We have noted that federal courts, interpreting state law, have come to different conclusions about the matter. Compare, *e. g., In re Paoli R. Yard PCB Litigation,* 916 F. 2d 829 (CA3 1990) (Pennsylvania law), with *Ball* v. *Joy Technologies, Inc.,* 958 F. 2d 36 (CA4 1991) (West Virginia and Virginia law). And we have ended up focusing on several important State Supreme Court cases that have permitted recovery. *Ayers* v. *Jackson,* 106 N. J. 557, 525 A. 2d 287 (1987); *Hansen* v. *Mountain Fuel Supply Co.,* 858 P. 2d 970 (Utah 1993); *Potter* v. *Firestone Tire & Rubber Co.,* 6 Cal. 4th 965, 863 P. 2d 795 (1993); see also *Burns* v. *Jacquays Mining Corp.,* 156 Ariz. 375, 752 P. 2d 28 (App. 1987).

We find it sufficient to note, for present purposes, that the cases authorizing recovery for medical monitoring in the absence of physical injury do not endorse a full-blown, traditional tort law cause of action for lump-sum damages—of the sort that the Court of Appeals seems to have endorsed here. Rather, those courts, while recognizing that medical monitoring costs can amount to a harm that justifies a tort remedy, have suggested, or imposed, special limitations on that remedy. Compare *Ayers, supra,* at 608, 525 A. 2d, at 314 (recommending in future cases creation of "a court-supervised fund to administer medical-surveillance payments"); *Hansen, supra,* at 982 (suggesting insurance mechanism or court-supervised fund as proper remedy); *Potter, supra,* at 1010, n. 28, 863 P. 2d, at 825, n. 28 (suggesting that a lump-sum damages award would be inappropriate); *Burns, supra,* at 381, 752 P. 2d, at 34 (holding that lump-sum damages are not appropriate), with, *e. g., Honeycutt* v. *Walden,* 294 Ark. 440, 743 S. W. 2d 809 (1988) (damages award for future medical expenses made necessary by physical injury are awarded as lump-sum payment); *Rice* v. *Hill,* 315 Pa. 166, 172 A. 289 (1934) (same); and Restatement (Second) of Torts § 920A(2) (1977) (ordinarily fact that plaintiff is insured is irrelevant to amount of tort recovery). Cf. Weinstein, Individual Justice in Mass Tort Litigation, at 154. We believe that the note of caution, the limitations, and the expressed uneasiness with a traditional lump-sum damages remedy are important, for they suggest a judicial recognition of some of the policy concerns that have been pointed out to us here—concerns of a sort that *Gottshall* identified.

Since, for example, the particular cancer-related costs at issue are the *extra* monitoring costs, over and above those otherwise recommended, their identification will sometimes pose special "difficult[ies] for judges and juries." *Gottshall,* 512 U. S., at 557. Those difficulties in part can reflect uncertainty among medical professionals about just which tests are most usefully administered and when. Cf. Report of U. S. Preventive Services Task Force, Guide to Clinical Preventive Services xxvii, xxx–xxxi, xlvii–xcii (2d ed. 1996). And in part those difficulties can reflect the fact that scientists will not always see a medical need to provide systematic *scientific* answers to the relevant *legal* question, namely, whether an exposure calls for *extra* monitoring. Cf. App. 182 (testimony by Buckley's expert conceding that periodic colon cancer screening "is recommended by the American

Cancer Society anyway"); *id.*, at 164 (testimony by Buckley's expert declining to rule out that periodic chest X rays would likely benefit smokers such as Buckley, even in the absence of asbestos exposure). Buckley's sole expert, then, was equivocal about the need for *extra* monitoring, and the defense had not yet put on its case.

Moreover, tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring. See *supra,* at 434–435. (The dissent limits its class of potential plaintiffs to employees suing their employers, see *post,* at 454, but other exposed individuals who satisfy the *Paoli* test, see *post,* at 449–450, could sue—at common law.) And that fact, along with uncertainty as to the amount of liability, could threaten both a "flood" of less important cases (potentially absorbing resources better left available to those more seriously harmed, see *supra,* at 435–436) and the systemic harms that can accompany "unlimited and unpredictable liability" (for example, vast testing liability adversely affecting the allocation of scarce medical resources). The dissent assumes that medical monitoring is not a "costly" remedy, see *post,* at 451 (internal quotation marks omitted). But Buckley here sought damages worth $950 annually for 36 years; by comparison, of all claims settled by the Center for Claims Resolution, a group representing asbestos manufacturers, from 1988 until 1993, the average settlement for plaintiffs *injured* by asbestos was about $12,500, and the settlement for nonmalignant plaintiffs among this group averaged $8,810. See App. in *Amchem Products, Inc.* v. *Windsor,* O. T. 1996, No. 96–270, p. 578.

Finally, a traditional, full-blown ordinary tort liability rule would ignore the presence of existing alternative sources of payment, thereby leaving a court uncertain about how much of the potentially large recoveries would pay for otherwise unavailable medical testing and how much would accrue to plaintiffs for whom employers or other sources (say, insurance now or in the future) might provide monitoring in any event. Cf. 29 CFR § 1910.1001(l) (1996) (requiring employers to provide medical monitoring for workers exposed to asbestos). The Occupational Safety and Health Administration regulations (which the dissent cites) help to demonstrate why the Second Circuit erred: where state and federal regulations already provide the relief that a plaintiff seeks, creating a full-blown tort remedy could entail systemic costs without corresponding benefits. Nor could an employer necessarily protect itself by offering monitoring, see *post*, at 453–454, for that is not part of the rule of law that JUSTICE GINSBURG would endorse—a rule that, if traditional, would, as we have noted, allow recovery irrespective of the presence of a "collateral source" of payment. See *post*, at 449.

We do not deny important competing considerations—of a kind that may have led some courts to provide a form of liability. Buckley argues, for example, that it is inequitable to place the economic burden of such care on the negligently exposed plaintiff rather than on the negligent defendant. See, *e. g., Ayers*, 106 N. J., at 603–606, 525 A. 2d, at 311–312; *Potter*, 6 Cal. 4th, at 1007–1009, 863 P. 2d, at 824. He points out that providing preventive care to individuals who would otherwise go without can help to mitigate potentially serious future health effects of diseases by detecting them in early stages; again, whether or not this is such a situation, we may assume that such situations occur. And he adds that, despite scientific uncertainties, the difficulty of separating justified from unjustified claims may be less serious than where emotional distress is the harm at issue. See also *Ayers, supra; Potter, supra.*

We do not deny that JUSTICE GINSBURG paints a sympathetic picture of Buckley and his co-workers; this picture has force because Buckley *is* sympathetic and he *has* suffered wrong at the hands of a negligent employer. But we are more troubled than is JUSTICE GINSBURG by the potential systemic effects of creating a new, full-blown, tort law cause of action—for example, the effects upon interests of other potential plaintiffs who are not before the court and who depend on a tort system that can distinguish between reliable and serious claims on the one hand, and unreliable and relatively trivial claims on the other. See *supra,* at 438. The reality is that competing interests are at stake—and those interests sometimes can be reconciled in ways other than simply through the creation of a full-blown, traditional, tort law cause of action. Cf. *post,* at 454.

We have not tried to balance these, or other, competing considerations here. We point them out to help explain why we consider the limitations and cautions to be important—and integral—parts of the state-court decisions that permit asymptomatic plaintiffs a separate tort claim for medical monitoring costs. That being so, we do not find sufficient support in the common law for the unqualified rule of lump-sum damages recovery that is, at least arguably, before us here. And given the mix of competing general policy considerations, plaintiff's policy-based arguments do not convince us that the FELA contains a tort liability rule of that *unqualified* kind.

This limited conclusion disposes of the matter before us. We need not, and do not, express any view here about the extent to which the FELA might, or might not, accommodate medical cost recovery rules more finely tailored than the rule we have considered.

IV

For the reasons stated, we reverse the determination of the Second Circuit, and we remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GINSBURG, with whom JUSTICE STEVENS joins, concurring in the judgment in part and dissenting in part.

The Federal Employers' Liability Act (FELA) was enacted to facilitate recovery for railworkers who suffer injuries as a result of their employers' negligence. "Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers." *Kernan* v. *American Dredging Co.*, 355 U. S. 426, 432 (1958). Until recently, this Court accorded the FELA a notably "liberal construction in order to accomplish [Congress'] objects." *Urie* v. *Thompson*, 337 U. S. 163, 180 (1949). Today's decision, however, continues the step-back approach taken in *Consolidated Rail Corporation* v. *Gottshall*, 512 U. S. 532 (1994). Even if the *Gottshall* decision supported the Court's rejection of Michael Buckley's claim for emotional distress, the Court's disposition of Buckley's medical monitoring claim marks a new and enigmatic departure from a once "constant and established course." *Urie*, 337 U. S., at 181–182.

Buckley's extensive contact with asbestos particles in Grand Central's tunnels, as I comprehend his situation, constituted "physical impact" as that term was used in *Gottshall*. Nevertheless, I concur in the Court's judgment with respect to Buckley's emotional distress claim. In my view, that claim fails because Buckley did not present objective evidence of severe emotional distress. See *Atchison, T. & S. F. R. Co.* v. *Buell*, 480 U. S. 557, 566–567, n. 13 (1987) ("severe emotional injury . . . has generally been required to establish liability for purely emotional injury"); see also *id.*, at 569, n. 18. Buckley testified at trial that he was angry at Metro-North and fearful of developing an asbestos-related disease. However, he sought no professional help to ease his distress, and presented no medical testimony concerning his mental health. See 79 F. 3d 1337, 1341 (CA2 1996). Under these circumstances, Buckley's emotional distress claim fails as a matter of law. Cf. *Gottshall*, 512 U. S., at 563–564, 566–567 (GINSBURG, J., dissenting) (describing as "unquestionably genuine and severe" emotional distress suffered by one respondent who had a nervous breakdown, and another who was hospitalized, lost weight, and had, *inter alia*, suicidal preoccupations, anxiety, insomnia, cold sweats, and nausea).

Concerning medical monitoring, the Court of Appeals ruled that Buckley stated a triable claim for monitoring expenses made "necessary because of his exposure to asbestos," expenses essential "to ensure early detection and cure of any asbestos-related disease he develops." 79 F. 3d, at 1347. I would not disturb that ruling.

I

As a pipefitter for Metro-North, Michael Buckley repaired and maintained the labyrinth of pipes in the steam tunnels of Grand Central Terminal in New York City. The pipes were surrounded by a white insulation material that Buckley and his co-workers had to remove to perform their jobs. Without any protective gear, the pipefitters would hammer, slice, and pull the insulation material, which broke apart as it was removed, scattering dust particles into the air. Fans used to mitigate the intense heat of the steam tunnels spread further dust from insulation pieces that had accumulated on tunnel floors. The dust coated Buckley's skin and clothing; he testified that he could taste the gritty insulation material as it entered his mouth and nose. The pipefitters would emerge from their work in the tunnels covered from head to toe with white dust; for this appearance, they were dubbed "the snowmen of Grand Central."

The insulation material covering Grand Central's pipes was made of asbestos, widely recognized as a carcinogen since the mid-1970's. Metro-North did not tell the pipefitters of, or provide protection against, the danger to which the workers were exposed until 1987, two years after Buckley started working in the steam tunnels. At an asbestos awareness class on August 31, 1987, Buckley and his co-workers learned of the asbestos in the pipe insulation and of the diseases asbestos exposure could cause. Buckley was then given a respirator and some instruction on the "glove bag" method of removing asbestos. He testified that his efforts to use the respirator and glove bag method proved frustrating: the respirator fit poorly and slid down his face as he perspired in the intense heat of the steam tunnels; the plastic bags used to isolate the asbestos melted on the hot pipes, spilling out the material instead of containing it.

Buckley and as many as 140 other asbestos-exposed workers sought legal counsel after their complaints to Metro-North management went unresolved. In the FELA action now before us, Buckley is serving as test plaintiff for the claims of all the exposed employees. Metro-North stipulated in the District Court that it had "negligently exposed the plaintiff Michael Buckley to asbestos while he was working in Grand Central Terminal from June 1985 to the beginning of September 1987." App. 594 (Admitted and Stipulated Facts). "[N]o later than 1986," Metro-North also conceded, "[it] obtained actual notice of the presence of asbestos in Grand Central Terminal and notice of the hazard that working with or around asbestos posed to the health and welfare of its employees." *Ibid.* Metro-North further acknowledged that "it exposed the plaintiff to asbestos without warning him that he was being exposed to asbestos and without training him how to safely handle and remove asbestos." *Ibid.* Prior to Metro-North's stipulation conceding negligence, the New York Attorney General's Office and the Office of the Inspector General of the Metropolitan Transportation Authority conducted a joint investigation, leading to these conclusions: Metro-North had "seriously disregarded the health and safety of its workers"; and the railroad's failings were "particularly egregious" because Metro-North was on notice of the asbestos problem as a result of complaints by its workers, a report by its own consultant, and inspections by the New York State Department of Labor. *Id.*, at 614.

II

Buckley asserted two claims for relief in his FELA-based complaint: first, he charged Metro-North with negligent infliction of emotional distress; second, he sought compensation for the cost of future medical monitoring. The Court definitively rejects Buckley's first claim by holding that, under the FELA, a railworker may not recover damages for emotional distress unless, and until, he manifests symptoms of a disease. See *ante,* at 427, 430. As to Buckley's second claim, however, the Court speaks tentatively. "[T]he respondent in this case," we are told, "has not shown that he is legally entitled to recover [medical monitoring] costs." *Ante,* at 427. "[A]rguably," the Court explains, Buckley demands an "unqualified rule of lump-sum damages recovery," *ante,* at 444, a rule for which the Court finds "[in]sufficient support in the common law," *ibid.* The Court pointedly refrains, however, from "express[ing] any view . . . about the extent to which the FELA might, or might not, accommodate medical cost recovery rules more finely tailored than" a "rule of [the] *unqualified* kind." *Ibid.* (emphasis in original).

It is not apparent why (or even whether) the Court reverses the Second Circuit's determination on Buckley's second claim. The Court of Appeals held that a medical monitoring claim is solidly grounded, and this Court does not hold otherwise. Hypothesizing that Buckley demands lump-sum damages and nothing else, the Court ruminates on the appropriate remedy without answering the anterior question: Does the plaintiff have a claim for relief? Buckley has shown that Metro-North negligently exposed him to "extremely high levels of asbestos," 79 F. 3d, at 1341, and that this exposure warrants "medical monitoring in order to detect and treat [asbestos-related] diseases as they may arise." *Id.,* at 1346. Buckley's expert medical witness estimated the annual costs of proper monitoring at $950. *Ibid.*[1] We do not know from the Court's opinion what more a plaintiff must show to qualify for relief.

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[1] Metro-North, of course, could contest that estimate as excessive. But the amount Buckley may recover is a matter discrete from the question whether he has stated a claim for relief.

A

In my view, the Second Circuit rightly held that a railworker negligently exposed to asbestos states a claim for relief under the FELA; recovery in such cases, again as the Court of Appeals held, should reflect the difference in cost between the medical tests a reasonable physician would prescribe for unexposed persons and the monitoring regime a reasonable physician would advise for persons exposed in the way Michael Buckley and his co-workers were. See *id.*, at 1347; see *infra,* at 450–451 (defining an asbestos-exposed worker's "injury"); see also *In re Paoli R. Yard PCB Litigation,* 916 F. 2d 829, 849–852 (CA3 1990) *(Paoli I),* cert. denied *sub nom. General Elec. Co.* v. *Knight,* 499 U. S. 961 (1991); *In re Paoli R. Yard PCB Litigation,* 35 F. 3d 717, 785–788 (CA3 1994) *(Paoli II),* cert. denied *sub nom. General Elec. Co.* v. *Ingram,* 513 U. S. 1190 (1995).

Recognizing such a claim would align the FELA with the "evolving common law." *Gottshall,* 512 U. S., at 558 (SOUTER, J., concurring). "[A medical monitoring] action has been increasingly recognized by state courts as necessary given the latent nature of many diseases caused by exposure to hazardous materials and the traditional common law tort doctrine requirement that an injury be manifest." *Daigle* v. *Shell Oil Co.,* 972 F. 2d 1527, 1533 (CA10 1992); see also Schwartz, Recovery of Damages for Expense of Medical Monitoring to Detect or Prevent Future Disease or Condition, 17 A. L. R. 5th 327 (1994). As the Court understates, several state high courts have upheld medical monitoring cost recovery. See *ante,* at 440. In a pathmarking opinion, the United States Court of Appeals for the Third Circuit, interpreting Pennsylvania law, recognized a right to compensation for monitoring "necessary in order to diagnose properly the warning signs of disease." See *Paoli I,* 916 F. 2d, at 851; see also *Paoli II,* 35 F. 3d, at 785–788. Similarly, a number of Federal District Courts interpreting state law, and several state courts of first and second instance, have sustained medical monitoring claims.[2] This Court, responsible for developing FELA law, finds little value in these decisions.

These courts have answered the question this Court passes by: What are the elements of a compensable medical monitoring claim? The Third Circuit, for example, has enumerated: A plaintiff can recover the costs of medical monitoring if (1) he establishes that he was significantly exposed to a proven hazardous substance through the negligent actions of the defendant; (2) as a proximate result of the exposure, the plaintiff suffers a significantly increased risk of contracting a serious latent disease; (3) by reason of the exposure a reasonable physician would prescribe a monitoring regime different from the one that would have been prescribed in the absence of the exposure; and (4) monitoring and testing procedures exist that make the early detection and treatment of the disease possible and beneficial. See *Paoli I*, 916 F. 2d, at 852; *Paoli II*, 35 F. 3d, at 788. Each factor must be shown by competent expert testimony. See *Paoli I*, 916 F. 2d, at 852.

A claim so defined comports with the terms of the FELA. Under the FELA, a railroad "shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U. S. C. § 51. The "injury" sustained by an asbestos-exposed worker seeking to recover medical monitoring costs is the invasion of that employee's interest in being free from the economic burden of extraordinary medical surveillance. See Restatement (Second) of Torts § 7 (1964) (defining injury as "the invasion of any legally protected interest of another"); see *Friends for All Children, Inc.* v. *Lockheed Aircraft Corp.*, 746 F. 2d 816, 826 (CADC 1984) ("It is difficult to dispute that an individual has an interest in avoiding expensive diagnostic examinations just as he or she has an interest in avoiding physical injury."); *Ayers* v. *Jackson*, 106 N. J. 557, 591, 525 A. 2d 287, 304 (1987).

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[2] The state court cases include: *Elam* v. *Alcolac, Inc.*, 765 S. W. 2d 42, 208–209 (Mo. App. 1988); *Askey* v. *Occidental Chemical Corp.*, 477 N. Y. S. 2d 242, 246–247 (App. Div. 1984). The Federal District Court cases include: *Day* v. *National Lead of Ohio*, 851 F. Supp. 869, 880–882 (SD Ohio 1994); *Bocook* v. *Ashland Oil, Inc.*, 819 F. Supp. 530, 536 (SD W. Va. 1993); *Stead* v. *F. E. Myers Co., Div. of McNeil Corp.*, 785 F. Supp. 56, 57 (Vt. 1990).

Traditional tort principles upon which the FELA rests warrant recognition of medical monitoring claims of the kind Buckley has asserted. As the Third Circuit explained, "[t]he policy reasons for recognizing this tort are obvious[:]"

> "Medical monitoring claims acknowledge that, in a toxic age, significant harm can be done to an individual by a tortfeasor, notwithstanding latent manifestation of that harm. Moreover, . . . recognizing this tort does not require courts to speculate about the probability of future injury. It merely requires courts to ascertain the probability that the far less costly remedy of medical supervision is appropriate. Allowing plaintiffs to recover the cost of this care deters irresponsible discharge of toxic chemicals by defendants and encourages plaintiffs to detect and treat their injuries as soon as possible. These are conventional goals of the tort system . . . ." *Paoli I*, 916 F. 2d, at 852.

See also *Potter* v. *Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1008, 863 P. 2d 795, 824 (1993); *Hansen* v. *Mountain Fuel Supply Co.*, 858 P. 2d 970, 976–978 (Utah 1993); *Ayers*, 106 N. J., at 603–605, 525 A. 2d, at 311–312; *Burns* v. *Jaquays Mining Corp.*, 156 Ariz. 375, 380–381, 752 P. 2d 28, 33–34 (App. 1987).

On all counts—exposure, increased risk of devastating disease, and the necessity of monitoring—Michael Buckley's complaint presents a textbook case. Through its stipulations, Metro-North has acknowledged that it failed "to use [the] reasonable care [the FELA requires] in furnishing its employees with a safe place to work." *Buell,* 480 U. S., at 558. At trial, "[c]ompetent expert testimony . . . established both that Buckley suffered a substantial impact from asbestos that . . . significantly increased his risk of contracting an asbestos-related disease and that Buckley should receive medical monitoring in order to ensure early detection and cure of any asbestos-related disease he develops." 79 F. 3d, at 1347. Thus, Metro-North, "through [its] negligence, caused the plaintiff, in the opinion of medical experts, to need specific medical services—a cost that is neither inconsequential nor of a kind the community generally accepts as part of the wear and tear of daily life. Under [the] principles of tort law, the [tortfeasor] should pay." *Friends for All Children,* 746 F. 2d, at 825.

B

The Court, as I read its opinion, leaves open the question whether Buckley may state a claim for relief under the FELA. The Court does not question the medical need for monitoring. It recognizes that cancer, one of the diseases Buckley faces an increased risk of suffering, is "unusually threatening and unusually frightening," *ante,* at 435, and that detection of disease in early stages "can help to mitigate potentially serious future health effects," *ante,* at 443. On the other hand, the Court notes there may be "uncertainty among medical professionals about just which tests are most usefully administered and when." *Ante,* at 441.

It is not uncommon, of course, that doctors will agree that medical attention is needed, yet disagree on what monitoring or treatment course is best. But uncertainty as to which tests are best or when they should be administered is not cause to deny a claim for relief. Fact triers in tort cases routinely face questions lacking indubitably clear answers: Did defendant's product cause plaintiff's disease? What will plaintiff's future disability and medical costs be? It bears repetition, moreover, that recovery on a FELA medical monitoring claim would be limited to the incremental cost of tests a reasonable physician would recommend as a result of the plaintiff's exposure. See 79 F. 3d, at 1347.

Occupational Safety and Health Administration (OSHA) regulations governing permissible levels of asbestos exposure in the workplace make it plain that medical monitoring is no "trivial" matter, see *ante*, at 444; the regulations are instructive on appropriate standards for necessary monitoring, see 29 CFR § 1910.1001 (1996); see also 29 U. S. C. § 655(b)(7) (authorizing Secretary of Labor to require employers to provide medical monitoring to employees exposed to hazardous substances). OSHA's regulations direct employers to provide medical monitoring for employees exposed to certain levels of asbestos, and they describe in detail the monitoring employers must make available. See 29 CFR § 1910.1001(*l*), App. D, App. E (1996). These regulations apply to all industries covered by the Occupational Safety and Health Act of 1970 (Act). Although the Act does not apply to state public employers such as Metro-North, see 29 U. S. C. § 652(5), New York State has adopted OSHA standards for its public employers, see N. Y. Lab. Law §§ 27-a(3)(c), (4)(a) (McKinney 1986 and Supp. 1997). Had Metro-North assiduously attended to those standards, Buckley might have been spared the costs he now seeks to recover.[3]

Finally, the Court's anticipation of a "'flood' of less important cases" and "'unlimited and unpredictable liability'" is overblown. See *ante*, at 442. The employee's "injury" in the claim at stake is the economic burden additional medical surveillance entails, see *supra,* at 450–451; if an employer provides all that a reasonable physician would recommend for the exposed employee, the employee would incur no costs and hence have no claim for compensation. Nor does the FELA claim Buckley states pave the way for "tens of millions of individuals" with similar claims. See *ante,* at 442. It is doubtful that many legions in the universe of individuals ever exposed to toxic material could demonstrate that their employers negligently exposed them to a known hazardous substance, and thereby substantially increased the risk that they would suffer debilitating or deadly disease.[4] Withholding relief, moreover, is dangerous, for lives will be lost when grave disease is diagnosed too late.

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[3] Buckley's counsel stated at oral argument that the railroad failed to conduct the required monitoring of airborne asbestos in the steam tunnels, and for that reason only, Metro-North escaped compliance with the requirement that employers provide ongoing medical monitoring of employees. Tr. of Oral Arg. 52. The record supports Buckley's assertion that Metro-North did not properly monitor the level of asbestos to which its workers were exposed. See App. 606–607 (noting that in 1986 the New York Department of Labor cited Metro-North for asbestos-related violations, including failure to monitor accurately the airborne concentrations of asbestos).

C

The Court emphasizes most heavily that several courts, while authorizing recovery for medical monitoring, have imposed or suggested special limitations on the tort remedy. See *ante,* at 440–441. In lieu of lump-sum damages, the Court indicates, a court-supervised fund might be the better remedy. See *ante,* at 441; see also *Potter,* 6 Cal. 4th, at 1006–1010, and n. 28, 863 P. 2d, at 821–825, and n. 28 (recognizing claim and affirming award for medical monitoring; suggesting in footnote creation of court-supervised fund); *Hansen,* 858 P. 2d, at 979–982 (reversing grant of summary judgment and recognizing claim for medical monitoring; suggesting creation of court-supervised fund); *Ayers,* 106 N. J., at 607–611, 525 A. 2d, at 313–315 (affirming damages award for medical monitoring; suggesting creation of court-supervised fund in future cases); *Burns,* 156 Ariz., at 380–381, 752 P. 2d, at 33–34 (recognizing claim for medical monitoring; holding plaintiffs entitled to award from court-supervised fund).

It is scarcely surprising that the Second Circuit did not consider relief through a court-supervised fund. So far as the record before us shows, no party argued in the District

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[4] If liability under the common law is to extend further, see *ante,* at 442, that is a matter for the States to decide.

Court, the Second Circuit, or even this Court, that medical monitoring expenses may be recoverable, but not through a lump sum, only through a court fund. The question aired below was the prime one the Court obscures: Does Buckley's medical monitoring claim warrant any relief?

Buckley sought "an 'amount of money' sufficient to 'compensate' him for 'future medical monitoring expenses.'" See *ante*, at 439. He was not more precise about the form relief should take. The Court infers from Buckley's proposed charges to the jury, however, that he wanted what "tort law ordinarily permits"—damages in a lump sum. See *ibid.* I believe his claim qualifies for that relief. If the Court deems what "tort law ordinarily permits" inappropriate, however, the Court should at least say, for the guidance of lower courts, "Yes, Buckley has *a* claim for relief." Federal Rule of Civil Procedure 54(c) directs a court to grant the relief to which a prevailing party is entitled, even if the party did not demand such relief in its pleadings. Rule 54(c) thus instructs district courts to "compensate the parties or remedy the situation without regard to the constraints of the antiquated and rigid forms of action." 10 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2662, pp. 133–134 (2d ed. 1983). Under the Federal Rules, "a party should experience little difficulty in securing a remedy other than that demanded in his pleadings when he shows he is entitled to it." *Id.*, at 135; see also *id.*, § 2664, at 163 (Rule 54(c) "has been utilized when the court awards a different type of relief from that demanded in the complaint"); cf. *Holt Civic Club* v. *Tuscaloosa*, 439 U. S. 60, 65–66 (1978) ("a federal court should not dismiss a meritorious constitutional claim because the complaint seeks one remedy rather than another plainly appropriate one") (citing Rule 54(c)).

* * *

The Court today reverses the Second Circuit's determination that Buckley has stated a claim for relief, but remands the case for further proceedings. If I comprehend the Court's enigmatic decision correctly, Buckley may replead a claim for relief and recover for medical monitoring, but he must receive that relief in a form other than a lump sum. Unaccountably, the Court resists the straightforward statement that would enlighten courts in this and similar cases: A claim for medical monitoring is cognizable under the FELA; it is a claim entirely in step with "'evolving common law.'" See *ante*, at 440 (citing *Gottshall*, 512 U. S., at 558 (SOUTER, J., concurring)). I therefore dissent from the Court's judgment to the extent it relates to medical monitoring.

GLICKMAN, SECRETARY OF AGRICULTURE *v.* WILEMAN BROTHERS & ELLIOTT, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 95–1184. Argued December 2, 1996—Decided June 25, 1997

Respondents, California tree fruitgrowers, handlers, and processors, initiated administrative proceedings challenging the validity of various regulations contained in marketing orders promulgated by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937 (AMAA). Congress enacted the AMAA to establish and maintain orderly agricultural-commodity marketing conditions and fair prices; the program, which is expressly exempted from the antitrust laws, displaces competition in favor of collective action in the discrete markets regulated. AMAA marketing orders set uniform prices, product standards, and other conditions for all producers in a particular market; must be approved by two-thirds of the affected producers; are implemented by committees of producers appointed by the Secretary; and impose assessments on producers for the expenses of their administration, including product advertising and promotion. The orders at issue assessed respondents for, *inter alia,* the cost of generic advertising of California nectarines, plums, and peaches. After the Department of Agriculture upheld the generic advertising regulations, respondents sought review in this action, which was consolidated with enforcement actions brought by the Secretary. The District Court upheld the orders and entered judgment for the Secretary, but the Ninth Circuit held that the Government enforced contributions to pay for generic advertising violated respondents' commercial speech rights under the test set forth in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.,* 447 U. S. 557, 566.

Held: The requirement that respondents finance generic advertising does not violate the First Amendment. Pp. 467–477.

(a) Respondents' claimed disagreement with the content of some of the advertising at issue has no bearing on the validity of the entire generic advertising program. The Ninth Circuit invalidated that program under *Central Hudson* because the Government failed to prove that such advertising was more effective than individual advertising in increasing consumer demand for California tree fruits. The factual assumption that generic advertising may not be the most effective method to promote these commodities is neither accepted nor rejected by this Court, which instead stresses the importance of the statutory context in which the question at issue arises. Under the AMAA, detailed marketing orders have displaced many aspects of independent business activity characterizing other portions of the economy in which competition is fully protected by the antitrust laws. Business entities are compelled to fund generic advertising as part of a broader collective enterprise in which the regulatory scheme already constrains their freedom to act independently. It is in this context that the Court considers whether to review the assessments at issue under the standard appropriate to economic regulation or under a heightened First Amendment standard. Pp. 467–469.

(b) The Ninth Circuit erred in relying on *Central Hudson* to test the constitutionality of market order assessments for promotional advertising. Three characteristics of the generic advertising scheme distinguish it from laws this Court has found to abridge free speech. First, the marketing orders impose no restraint on any respondents' freedom to communicate any message to any audience. Second, they do not compel anyone to engage in any actual or symbolic speech. Cf., *e. g., West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 632. Third, they do not compel anyone to endorse or to finance any political or ideological views. Cf., *e. g., Wooley* v. *Maynard*, 430 U. S. 705. Indeed, since respondents market California tree fruits, they may all be presumed to agree with the central message of the speech generated by the generic program. Thus, none of the Court's First Amendment jurisprudence supports the suggestion that the promotional regulations should be scrutinized under a different standard from that applicable to the marketing orders' other anticompetitive features. Respondents' criticisms of the generic advertising and their contention that the assessments reduce the sums respondents use to conduct their own advertising provide no basis for concluding that accurate advertising constitutes an abridgment of anybody's right to speak freely. Nor does the First Amendment forbid all compelled financial contributions to fund advertising. *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209, and the cases that follow it, prohibit compelled contributions for expressive activities that conflict with one's freedom of belief. The advertising here does not promote any particular message with which respondents disagree. The fact that respondents may prefer to foster that message in other ways does not make this case comparable to those involving political or ideological disagreement. Moreover, some of the relevant cases suggest that assessments to fund a lawful collective program may be used to pay for nonideological speech over the objection of some members of the group if the speech is germane to the purpose for which the compelled association was justified.

See, *e. g., Keller* v. *State Bar of Cal.*, 496 U. S. 1, 13–14. This test is clearly satisfied here because (1) the generic advertising of California tree fruit is unquestionably germane to the marketing orders' purposes and, (2) in any event, the assessments are not used to fund ideological activities. Although the wisdom of the generic advertising program may be questioned, its debatable features are insufficient to warrant special First Amendment scrutiny. Pp. 469–474.

(c) The Ninth Circuit's decision to apply the *Central Hudson* test is inconsistent with the very nature and purpose of the collective action program at issue. The AMAA rests on an assumption that in the volatile agricultural commodities markets the public will be best served by compelling cooperation among producers in making economic decisions that would be made independently in a free market. The First Amendment does not provide a basis for reviewing such economic regulation, which enjoys the same strong presumption of validity that this Court accords to other policy judgments made by Congress. Appropriate respect for Congress' power to regulate interstate commerce provides abundant support for the marketing orders' constitutionality. Generic advertising is intended to stimulate consumer demand for an agricultural product in a regulated market. That purpose is legitimate and consistent with the regulatory goals of the overall statutory scheme. The mere fact that one or more producers do not wish to foster generic advertising of their product is not a sufficient reason for judges to override the judgment of the majority of market participants, bureaucrats, and legislators that such programs are beneficial. Pp. 474–477.

58 F. 3d 1367, reversed.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, GINSBURG, and BREYER, JJ., joined. SOUTER, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined, and in which THOMAS, J., joined except as to Part II, *post*, p. 477. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined as to Part II, *post*, p. 504.

Alan Jenkins argued the cause for petitioner. With him on the briefs were *Acting Solicitor General Dellinger, Assistant Attorney General Hunger, Deputy Solicitor General Kneedler, Douglas N. Letter, Irene M. Solet,* and *Daniel Bensing.*

Thomas E. Campagne argued the cause for respondents. With him on the brief for Wileman Bros. & Elliott, Inc., et al. was *Clifford C. Kemper. Michael W. McConnell, Alan E.*

Untereiner, Gary A. Orseck, and *James A. Moody* filed a brief for respondents Gerawan Farming, Inc., et al.*

JUSTICE STEVENS delivered the opinion of the Court.

A number of growers, handlers, and processors of California tree fruits (respondents) brought this proceeding to challenge the validity of various regulations contained in marketing orders promulgated by the Secretary of Agriculture. The orders impose assessments on respondents that cover the expenses of administering the orders, including the cost of generic advertising of California nectarines, plums, and peaches. The question presented to us is whether the requirement that respondents finance such generic advertising

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*Briefs of *amici curiae* urging reversal were filed for the State of Arizona et al. by *Daniel E. Lungren,* Attorney General of California, *Charles W. Getz IV,* Assistant Attorney General, and *Edna Walz,* Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Grant Woods* of Arizona, *Robert A. Butterworth* of Florida, *Frank J. Kelley* of Michigan, *Don Stenberg* of Nebraska, *Peter Verniero* of New Jersey, *Dennis C. Vacco* of New York, *Theodore R. Kulongoski* of Oregon, *Jeffrey L. Amestoy* of Vermont, and *James S. Gilmore II* of Virginia; for the American Federation of Labor and Congress of Industrial Organizations by *Jonathan P. Hiatt, James B. Coppess, Mark Schneider,* and *Laurence Gold;* for the National Association of State Departments of Agriculture et al. by *John G. Roberts, Jr.,* and *Richard T. Rossier;* and for the Washington Apple Commission et al. by *Robert S. Hedrick, George H. Soares, Dale A. Stern, Kendall L. Manock, Charles K. Manock,* and *Patrick J. Kole.*

Briefs of *amici curiae* urging affirmance were filed for the American Advertising Federation et al. by *Richard E. Wiley, Daniel E. Troy, Robert L. Sherman, John F. Kamp, David S. Versfelt,* and *Slade Metcalf;* for the National Right to Work Legal Defense Foundation, Inc., by *John C. Scully;* for the Sun-Maid Growers of California by *Catherine A. Conway* and *Vincent M. Waldman;* for Treehouse Farms, Inc., by *Timothy B. Dyk;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp.*

Briefs of *amici curiae* were filed for the Pacific Legal Foundation by *Sharon L. Browne;* and for the United Sheep Producers by *Brian C. Leighton.*

is a law "abridging the freedom of speech" within the meaning of the First Amendment.

I

Congress enacted the Agricultural Marketing Agreement Act of 1937 (AMAA), ch. 296, 50 Stat. 246, as amended, 7 U. S. C. § 601 *et seq.*, in order to establish and maintain orderly marketing conditions and fair prices for agricultural commodities. § 602(1). Marketing orders promulgated pursuant to the AMAA are a species of economic regulation that has displaced competition in a number of discrete markets; they are expressly exempted from the antitrust laws. § 608b. Collective action, rather than the aggregate consequences of independent competitive choices, characterizes these regulated markets. In order "to avoid unreasonable fluctuations in supplies and prices," § 602(4), these orders may include mechanisms that provide a uniform price to all producers in a particular market,[1] that limit the quality and the quantity of the commodity that may be marketed, §§ 608c(6)(A), (7), that determine the grade and size of the commodity, § 608c(6)(A), and that make an orderly disposition of any surplus that might depress market prices, *ibid.* Pursuant to the policy of collective, rather than competitive, marketing, the orders also authorize joint research and development projects, inspection procedures that ensure uniform quality, and even certain standardized packaging requirements. §§ 608c(6)(D), (H), (I). The expenses of administering such orders, including specific projects undertaken to serve the economic interests of the cooperating producers, are "paid from funds collected pursuant to the marketing order." §§ 608c(6)(I), 610(b)(2)(ii).

Marketing orders must be approved by either two-thirds of the affected producers or by producers who market at least two-thirds of the volume of the commodity. § 608c(9)(B). The AMAA restricts the marketing orders "to the smallest regional production areas . . . practicable." § 608c(11)(b). The orders are implemented by committees composed of producers and handlers of the regulated commodity, appointed by the Secretary, who recommend rules to the Secretary governing marketing matters such as fruit size and maturity levels. 7 CFR §§ 916.23, 916.62, 917.25, 917.30 (1997). The committees also determine the annual rate of assessments to cover the expenses of administration, inspection services, research, and advertising and promotion. §§ 916.31(c), 917.35(f).

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[1] See, *e. g., United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533 (1939); *West Lynn Creamery, Inc.* v. *Healy*, 512 U. S. 186, 188–189 (1994).

Among the collective activities that Congress authorized for certain specific commodities is "any form of marketing promotion including paid advertising." 7 U. S. C. § 608c(6)(I).[2] The authorized promotional activities, like the marketing orders themselves, are intended to serve the producers' common interest in disposing of their output on favorable terms. The central message of the generic advertising at issue in this case is that "California Summer Fruits" are wholesome, delicious, and attractive to discerning shoppers. See App. 530. All of the relevant advertising, insofar as it is authorized by the statute and the Secretary's regulations, is designed to serve the producers' and handlers' common interest in promoting the sale of a particular product.[3]

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[2] Congress amended the AMAA in 1954 to authorize the Secretary to establish "marketing . . . development projects." See Agricultural Act of 1954, § 401(c), 68 Stat. 906.

[3] Those regulations include provisions minimizing the risk that the generic advertising might adversely affect the interests of any individual producer. See 7 U. S. C. § 608c(16)(A)(i) (providing for termination or suspension of an order that does not "effectuate the declared policy" of the AMAA); § 608c(16)(B) (providing for termination of an order if a majority of producers does not support a regulation); § 608c(15)(A) (allowing handlers subject to a marketing order to petition for modification or exemption from an order that is inconsistent with the statute). For the purpose of this case, we assume that those regulations accomplish their goals, and that the generic advertising programs therefore further the interests of

II

The regulations at issue in this litigation are contained in Marketing Order 916, which regulates nectarines grown in California, and Marketing Order 917, which originally regulated peaches, pears, and plums grown in California.[4] A 1966 amendment to the former expressly authorized generic advertising of nectarines, see 31 Fed. Reg. 8177, and a series of amendments, beginning in 1971, to the latter authorized advertising of each of the regulated commodities, see 36 Fed. Reg. 14381 (1971); 41 Fed. Reg. 14375, 17528 (1976).[5] The advertising provisions relating to pears are not now being challenged, thus we limit our discussion to generic advertising of California nectarines, plums, and peaches.

Respondent Wileman Bros. & Elliott, Inc., is a large producer of these fruits that packs and markets its own output as well as that grown by other farmers. In 1987, after encountering problems with some fruit varieties under the maturity and minimum size standards in the orders, it refused to pay its assessments and filed a petition with the Secretary challenging those standards. In 1988, it filed a second petition challenging amendments to the maturity standards as well as the generic advertising regulations. The Administrative Law Judge (ALJ), in two separate decisions that are explained in a total of 769 pages, ruled in favor of Wileman on the Administrative Procedure Act (APA) issues, without resolving respondents' First Amendment claims. App. to

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those who pay for them. We do not, however, rule out the possibility that, despite the approval of generic advertising by at least two-thirds of the handlers, individual advertising might be even more effective.

[4] The original marketing order for California peaches and plums was first issued in 1939. See 4 Fed. Reg. 2135 (1939). The marketing order for California nectarines was issued in 1958. See 7 CFR § 937.45 (1959).

[5] The plum portion of Order 917 was terminated in 1991 after a majority of plum producers failed to vote for its continuation, see 56 Fed. Reg. 23772, but because some of the respondents are seeking a refund of 1991 assessments for plum advertising, the validity of that portion of the program is not moot.

Brief in Opposition 393a.[6] In a comparably detailed decision, the Judicial Officer of the Department of Agriculture entirely reversed the ALJ. Wileman, along with 15 other handlers, then sought review of the Judicial Officer's decision by filing this action in the District Court pursuant to 7 U. S. C. § 608c(15)(B). A number of enforcement actions brought by the Secretary to collect withheld assessments were consolidated with the review proceeding. Acting on cross-motions for summary judgment, the District Court upheld both marketing orders and entered judgment of $3.1 million in past due assessments against the handlers.

In the Court of Appeals the handlers challenged the generic advertising provisions of the orders as violative of both the APA and the First Amendment. The court rejected the statutory challenge, concluding that the record contained substantial evidence justifying both the original decision to engage in generic advertising[7] and the continuation of the program. It explained:

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[6] The ALJ indicated that if respondents "were not to succeed in their nonconstitutional arguments" she would rule in their favor on the First Amendment claim. App. to Brief in Opposition 393a.

[7] The Court of Appeals quoted the following as a "typical excerpt": " 'The record shows a wide consensus among the peach and pear industries that promotional activities have been beneficial in increasing demand and should be continued.

. . . . .

" 'Media generally is expensive but some things can be done selectively in this field that are inexpensive and yet create an impact on the buying trade as well as the consuming public. Trade paper ads, particularly at the beginning of the season, together with the editorial support which trade papers are willing to accord an advertiser are helpful in launching a program for seasonal fruits such as peaches and pears. Spot radio or TV commercials in the principal markets during peak movement periods have proved to be successful. It has been found in many fresh promotional programs that spot announcements, particularly when developed with a "dealer tag" at the end of each spot, have considerable influence in triggering retail promotions. 41 Fed. Reg. 14,375, 14,376–77 (1976).' " *Wileman Bros. & Elliott, Inc.* v. *Espy,* 58 F. 3d 1367, 1375 (CA9 1995).

> "The Nectarine Administrative Committee and the Peach Commodity Committee engage in a careful process each year prior to and during their annual spring meetings in approving the advertising program for the upcoming season. Prior to the full committee meeting, the Subcommittee on Advertising and Promotion meets to review in detail the program developed by its staff. The staff in turn uses monthly reports on price trends, consumer interests, and general market conditions in the formation of the proposed advertising program.
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> . . . . .
>
> "[I]t is only because the handlers themselves, through the committees, recommend a budget with a generic advertising component that the program is renewed by the Secretary every year. In fact, in most years the recommendations have been unanimous. We cannot assume that the handlers—the parties with firsthand knowledge of the state of their industry—would make recommendations that have an adverse effect on their businesses. Of course, the interests of the voting committee members may not always coincide with those of every handler in the industry. However, this court has previously noted that the Supreme Court 'upheld the constitutionality of the system despite the fact that it may produce results with which some growers or handlers will disagree.' *Saulsbury Orchards and Almond Processing, Inc. v. Yeutter*, 917 F. 2d 1190, 1197 (9th Cir. 1990) (citing *United States v. Rock Royal Coop.*, 307 U. S. 533 . . . (1939))." *Wileman Bros. & Elliott, Inc.* v. *Espy*, 58 F. 3d 1367, 1375–1376 (CA9 1995) (footnote omitted).

The Court of Appeals concluded, however, that Government enforced contributions to pay for generic advertising violated the First Amendment rights of the handlers. Relying on an earlier Ninth Circuit decision that had cited our decision in *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977), see *Cal-Almond, Inc.* v. *United States Dept. of Agriculture*, 14 F. 3d 429 (CA9 1993), the court began by stating that the "First Amendment right of freedom of speech includes a right not to be compelled to render financial support for others' speech." 58 F. 3d, at 1377. It then reviewed the generic advertising regulations under "the test for restrictions on commercial speech set out in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U. S. 557, 566 . . . (1980)." *Id.*, at 1378. Although it was satisfied that the Government interest in enhancing returns to peach and nectarine growers was substantial, it was not persuaded that the generic advertising passed either the second or third "prongs" of *Central Hudson.* With respect to the former, even though the generic advertising "undoubtedly" has increased peach and nectarine sales, the Government failed to prove that it did so more effectively than individualized advertising. The court also concluded that the program was not "narrowly tailored" because it did not give the handlers any credit for their own advertising and because California was the only State in which such programs were in place.[8]

The Court of Appeals' disposition of the First Amendment claim is in conflict with a decision of the Court of Appeals for the Third Circuit that rejected a challenge to generic advertising of beef authorized by the Beef Promotion and Research Act of 1985, 7 U. S. C. §§ 2901–2911. *United States* v. *Frame*, 885 F. 2d 1119, 1136, 1137 (1989). Characterizing that statute as "legislation in furtherance of an ideologically neutral compelling state interest," *id.*, at 1137, and noting that the "Cattlemen's Board is authorized only to develop a campaign to promote the product that the defendant himself has chosen to market," *id.*, at 1136, despite the plaintiff's objections to the content of the advertising,[9] the court found no violation of his First Amendment rights.

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[8] Respondents also challenged other features of the collective program including the fruit maturity and minimum size requirements. Reviewing these aspects of the order pursuant to the deferential standard of review provided in the APA, the Court of Appeals found that they were not arbitrary and capricious. See 58 F. 3d, at 1382, 1384.

We granted the Secretary's petition for certiorari to resolve the conflict, 517 U. S. 1232 (1996), and now reverse.

III

In challenging the constitutionality of the generic advertising program in the Court of Appeals, respondents relied, in part, on their claimed disagreement with the content of some of the generic advertising. 58 F. 3d, at 1377, n. 6. The District Court had found no merit to this aspect of their claim,[10] and the Court of Appeals did not rely on it for its conclusion that the program was unconstitutional. Rather, the Court of Appeals invalidated the entire program on the theory that the program could not survive *Central Hudson* because the Government had failed to prove that generic advertising was more effective than individual advertising in increasing consumer demand for California nectarines, plums, and peaches. That holding did not depend at all on either the content of the advertising, or on the respondents' claimed disagreement with any particular message. Although respondents have continued in this Court to argue about their disagreement with particular messages, those arguments, while perhaps calling into question the administration of portions of the program, have no bearing on the validity of the entire program.[11]

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[9] The plaintiff had claimed that he disagreed with the point of view expressed in advertising that the consumption of beef is " 'desirable, healthy, nutritious' "; the court concluded that his claim was not "a dispute over anything more than mere strategy." *Frame*, 885 F. 2d, at 1137.

[10] The District Court stated: "Scattered throughout plaintiffs' briefs are additional objections which are difficult to characterize or quantify. They assert that the advertising condones 'lying' in that it promotes the 'lie' that red colored fruit is superior, that it rewards mediocrity by advertising all varieties of California fruit to be of equal quality, that it promotes sexually subliminal messages as evidenced by an ad depicting a young girl in a wet bathing suit, and that it promotes the 'socialistic programs' of the Secretary. It is impossible from these 'vague claims' to determine that plaintiffs' first amendment rights have been significantly infringed." *Wileman Bros. & Elliott, Inc.* v. *Madigan*, Civ. No. F-90-473-OWW (ED Cal. 1993), reprinted in App. to Pet. for Cert. 91a-92a.

For purposes of our analysis, we neither accept nor reject the factual assumption underlying the Court of Appeals' invalidation of the program—namely, that generic advertising may not be the most effective method of promoting the sale of these commodities. The legal question that we address is whether being compelled to fund this advertising raises a First Amendment issue for us to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve.

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[11] Respondents argue that assessments were used to fund advertisements conveying the message that red nectarines are superior to other nectarines, Brief for Respondents Wileman Brothers et al. 33, and advertisements conveying the message that "all California fruit is the same," *ibid.;* Brief for Respondents Gerawan Farming, Inc., et al. 46. They contend that they object to these messages because some of respondent companies grow varieties of nectarines that are not red, and because they seek to promote the fact that the commodities are highly varied. See Brief for Respondents Wileman Brothers et al. 33; Brief for Respondents Gerawan Farming, Inc., et al. 46. Respondents' argument concerning promotion of red varieties appears to confuse complaints concerning maturity standards imposed on peach and nectarine growers with complaints concerning advertising. See, *e. g.*, App. 233; *id.*, at 692. The argument that the advertising promotes a view that all California fruit is the same is premised upon no particular advertisement, but rather upon testimony by respondents' executives concerning their general opposition to paying for generic advertising. See, *e. g.*, *id.*, at 588; *id.*, at 662–663.

Respondents also suggest that assessments were improperly used to fund materials promoting fruit varieties grown exclusively by their competitors. Brief for Respondents Wileman Brothers et al. 19–20. The claim, however, arises simply from a single reference to Red Jim nectarines, listed among 25 varieties, on a 1989 chart illustrating the availability of mid- to late-season summer tree fruits. App. 531.

These complaints, if they have any merit, are all essentially challenges to the administration of the program that are more properly addressed to the Secretary.

In answering that question we stress the importance of the statutory context in which it arises. California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme. It is in this context that we consider whether we should review the assessments used to fund collective advertising, together with other collective activities, under the standard appropriate for the review of economic regulation or under a heightened standard appropriate for the review of First Amendment issues.

IV

Three characteristics of the regulatory scheme at issue distinguish it from laws that we have found to abridge the freedom of speech protected by the First Amendment. First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience.[12] Second, they do not compel any person to engage in any actual or symbolic speech.[13] Third, they do not compel the producers to endorse or to finance any political or ideological views.[14] Indeed, since all of the respondents are engaged in the business of marketing California nectarines, plums, and peaches, it is fair to presume that they agree with the central message of the speech that is generated by the generic program. Thus, none of our First Amendment jurisprudence provides any support for the suggestion that the promotional regulations should be scrutinized under a different standard from that applicable to the other anticompetitive features of the marketing orders.

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[12] This fact distinguishes the limits on commercial speech at issue in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980), *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976), and *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484 (1996).

[13] This fact distinguishes the compelled speech in *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943), *Wooley* v. *Maynard*, 430 U. S. 705 (1977), *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781 (1988), and the compelled association in *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557 (1995).

Respondents advance several arguments in support of their claim that being required to fund the generic advertising program violates the First Amendment. Respondents argue that the assessments for generic advertising impinge on their First Amendment rights because they reduce the amount of money that producers have available to conduct their own advertising. This is equally true, however, of assessments to cover employee benefits, inspection fees, or any other activity that is authorized by a marketing order. The First Amendment has never been construed to require heightened scrutiny of any financial burden that has the incidental effect of constraining the size of a firm's advertising budget. The fact that an economic regulation may indirectly lead to a reduction in a handler's individual advertising budget does not itself amount to a restriction on speech.

The Court of Appeals, perhaps recognizing the expansive nature of respondents' argument, did not rely on the claim that the assessments for generic advertising indirectly limit the extent of the handlers' own advertising. Rather, the Court of Appeals apparently accepted respondents' argument that the assessments infringe First Amendment rights because they constitute compelled speech. Our compelled speech case law, however, is clearly inapplicable to the regulatory scheme at issue here. The use of assessments to pay for advertising does not require respondents to repeat an objectionable message out of their own mouths, cf. *West Virginia Bd. of Ed.* v. *Barnette,* 319 U. S. 624, 632 (1943), require them to use their own property to convey an antagonistic ideological message, cf. *Wooley* v. *Maynard,* 430 U. S. 705 (1977); *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n of Cal.,* 475 U. S. 1, 18 (1986) (plurality opinion), force them to respond to a hostile message when they "would prefer to remain silent," see *ibid.*, or require them to be publicly identified or associated with another's message, cf. *PruneYard Shopping Center* v. *Robins,* 447 U. S. 74, 88 (1980). Respondents are not required themselves to speak, but are merely required to make contributions for advertising. With trivial exceptions on which the court did not rely,[15] none of the generic advertising conveys any message with which respondents disagree. Furthermore, the advertising is attributed not to them, but to the California Tree Fruit Agreement or "California Summer Fruits." See, *e. g.*, App. 530.

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[14] This fact distinguishes cases like *Machinists* v. *Street,* 367 U. S. 740 (1961), *Abood* v. *Detroit Bd. of Ed.,* 431 U. S. 209 (1977), and *Keller* v. *State Bar of Cal.,* 496 U. S. 1 (1990).

Although this regulatory scheme may not compel speech as recognized by our case law, it does compel financial contributions that are used to fund advertising. As the Court of Appeals read our decision in *Abood,* just as the First Amendment prohibits compelled speech, it prohibits—at least without sufficient justification by the government—compelling an individual to "render financial support for others' speech." 58 F. 3d, at 1377. However, *Abood,* and the cases that follow it, did not announce a broad First Amendment right not to be compelled to provide financial support for any organization that conducts expressive activities. Rather, *Abood* merely recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's "freedom of belief." 431 U. S., at 235. We considered, in *Abood,* whether it was constitutional for the State of Michigan to require government employees who objected to unions or union activities to contribute to an "agency shop" arrangement requiring all employees to pay union dues as a condition of employment. We held that compelled contributions to support activities related to collective bargaining were "constitutionally justified by the legislative assessment of the important contribution of the union shop" to labor relations. *Id.*, at 222. Relying on our compelled-speech cases, however, the Court found that compelled contributions for political purposes unrelated to collective bargaining implicated First Amendment interests because they interfere with the values lying at the "heart of the First Amendment[—]the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Id.*, at 234–235; see also *id.*, at 235.

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[15] See n. 10, *supra.*

Here, however, requiring respondents to pay the assessments cannot be said to engender any crisis of conscience. None of the advertising in this record promotes any particular message other than encouraging consumers to buy California tree fruit. Neither the fact that respondents may prefer to foster that message independently in order to promote and distinguish their own products, nor the fact that they think more or less money should be spent fostering it, makes this case comparable to those in which an objection rested on political or ideological disagreement with the content of the message. The mere fact that objectors believe their money is not being well spent "does not mean [that] they have a First Amendment complaint." *Ellis* v. *Railway Clerks*, 466 U. S. 435, 456 (1984).

Moreover, rather than suggesting that mandatory funding of expressive activities always constitutes compelled speech in violation of the First Amendment, our cases provide affirmative support for the proposition that assessments to fund a lawful collective program may sometimes be used to pay for speech over the objection of some members of the group. Thus, in *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507 (1991), while we held that the cost of certain publications that were not germane to collective-bargaining activities could not be assessed against dissenting union members, *id.*, at 527–528, we squarely held that it was permissible to charge them for those portions of "the Teachers' Voice that concern teaching and education generally, professional development, unemployment, job opportunities, award programs . . . , and other miscellaneous matters." *Id.*, at 529. That holding was an application of the rule announced in *Abood* and further refined in *Keller* v. *State Bar of Cal.*, 496 U. S. 1 (1990), a case involving bar association activities.

As we pointed out in *Keller*, "*Abood* held that a union could not expend a dissenting individual's dues for ideological activities not 'germane' to the purpose for which compelled association was justified: collective bargaining. Here the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity." *Id.*, at 13–14. This test is clearly satisfied in this case because (1) the generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders and, (2) in any event, the assessments are not used to fund ideological activities.[16]

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[16] The generic advertising program at issue here is even less likely to pose a First Amendment burden than the programs upheld in *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507 (1991). *Lehnert* involved collective programs in the context of a union agency-shop agreement which arguably always poses some burden on First Amendment rights. See *id.*, at 518 (noting that agency-shop agreements inherently burden First Amendment rights); see also *Abood*, 431 U. S., at 222 (recognizing that all compelled contributions for collective bargaining affect First Amendment interests because an employee may have ideological, moral, or religious objections to the union's activities). By contrast, the collective programs authorized

We are not persuaded that any greater weight should be given to the fact that some producers do not wish to foster generic advertising than to the fact that many of them may well object to the marketing orders themselves because they might earn more money in an unregulated market. Respondents' criticisms of generic advertising provide no basis for concluding that factually accurate advertising constitutes an abridgment of anybody's right to speak freely. Similar criticisms might be directed at other features of the regulatory orders that impose restraints on competition that arguably disadvantage particular producers for the benefit of the entire market.[17] Although one may indeed question the wisdom of such a program, its debatable features are insufficient to warrant special First Amendment scrutiny. It was therefore error for the Court of Appeals to rely on *Central Hudson* for the purpose of testing the constitutionality of market order assessments for promotional advertising.[18]

V

The Court of Appeals' decision to apply the *Central Hudson* test is inconsistent with the very nature and purpose of the collective action program at issue here. The Court of

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by the marketing order do not, as a general matter, impinge on speech or association rights. Cf. *Roberts* v. *United States Jaycees,* 468 U. S. 609, 634, 635 (1984) (opinion of O'CONNOR, J.) (finding "only minimal constitutional protection of the freedom of *commercial* association" and that an association whose "activities are not predominantly of the type protected by the First Amendment" is subject to "rationally related state regulation of its membership").

[17] As we have already noted, n. 8, *supra,* respondents failed in their challenge to the other features of the programs before the District Court and the Court of Appeals.

[18] The Court of Appeals fails to explain why the *Central Hudson* test, which involved a restriction on commercial speech, should govern a case involving the compelled funding of speech. Given the fact that the Court of Appeals relied on *Abood* for the proposition that the program implicates the First Amendment, it is difficult to understand why the Court of Appeals did not apply *Abood*'s "germaneness" test.

Appeals concluded that the advertising program does not "directly advance" the purposes of the marketing orders because the Secretary had failed to prove that generic advertising is any more effective in stimulating consumer demand for the commodities than the advertising that might otherwise be undertaken by producers acting independently. We find this an odd burden of proof to assign to the administrator of marketing orders that reflect a policy of displacing unrestrained competition with Government supervised cooperative marketing programs. If there were no marketing orders at all to set maturity levels, size, quantity, and other features, competition might well generate greater production of nectarines, peaches, and plums. It may also be true that if there were no generic advertising, competition would generate even more advertising and an even larger consumer demand than does the cooperative program. But the potential benefits of individual advertising do not bear on the question whether generic advertising directly advances the statute's collectivist goals. Independent advertising would be primarily motivated by the individual competitor's interest in maximizing its own sales, rather than in increasing the overall consumption of a particular commodity. While the First Amendment unquestionably protects the individual producer's right to advertise its own brands, the statute is designed to further the economic interests of the producers as a group. The basic policy decision that underlies the entire statute rests on an assumption that in the volatile markets for agricultural commodities the public will be best served by compelling cooperation among producers in making economic decisions that would be made independently in a free market. It is illogical, therefore, to criticize any cooperative program authorized by this statute on the ground that competition would provide greater benefits than joint action.

On occasion it is appropriate to emphasize the difference between policy judgments and constitutional adjudication.

Judges who have endorsed the view that the Sherman Act is a charter of economic liberty[19] naturally approach laws that command competitors to participate in joint ventures with a jaundiced eye. Doubts concerning the policy judgments that underlie many features of this legislation do not, however, justify reliance on the First Amendment as a basis for reviewing economic regulations. Appropriate respect for the power of Congress to regulate commerce among the States provides abundant support for the constitutionality of these marketing orders on the following reasoning.

Generic advertising is intended to stimulate consumer demand for an agricultural product in a regulated market. That purpose is legitimate and consistent with the regulatory goals of the overall statutory scheme. See § 602(1). At least a majority of the producers in each of the markets in which such advertising is authorized must be persuaded that it is effective, or presumably the programs would be discontinued.[20] Whether the benefits from the advertising justify its cost is a question that not only might be answered differently in different markets, but also involves the exercise of policy judgments that are better made by producers and administrators than by judges.

As with other features of the marketing orders, individual producers may not share the views or the interests of others in the same market. But decisions that are made by the majority, if acceptable for other regulatory programs, should be equally so for promotional advertising. Perhaps more money may be at stake when a generic advertising program is adopted than for other features of the cooperative endeavor, but that fact does not transform this question of business judgment into a constitutional issue. In sum, what we are reviewing is a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress. The mere fact that one or more producers "do not wish to foster" generic advertising of their product is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial.

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[19] See, *e. g., Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 359–360 (1933); *Northern Pacific R. Co.* v. *United States,* 356 U. S. 1, 4 (1958); *Vendo Co.* v. *Lektro-Vend Corp.,* 433 U. S. 623, 647 (1977) (STEVENS, J., dissenting).

[20] The Secretary must terminate an order if he determines that it does not further the policies of the AMAA, see 7 U. S. C. § 608c(16)(A)(i), or that a majority of producers does not support it, see § 608c(16)(B). The committee voted unanimously for generic advertising assessments in each of the years at issue here. See 58 F. 3d, at 1376.

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE SOUTER, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, and with whom JUSTICE THOMAS joins except as to Part II, dissenting.

The Court today finds no First Amendment right to be free of coerced subsidization of commercial speech, for two principal reasons. First, the Court finds no discernible element of speech in the implementation of the Government's marketing orders, beyond what it sees as "germane" to the undoubtedly valid, nonspeech elements of the orders. Second, the Court in any event takes the position that a person who is neither barred from saying what he wishes, nor subject to personal attribution of speech he dislikes, has no First Amendment objection to mandatory subsidization of speech unless it is ideological or political or contains a message with which the objecting person disagrees. I part company with the Court on each of these closely related points. The legitimacy of governmental regulation does not validate coerced subsidies for speech that the government cannot show to be reasonably necessary to implement the regulation, and the very reasons for recognizing that commercial speech falls within the scope of First Amendment protection likewise justifies the protection of those who object to subsidizing it against their will. I therefore conclude that forced payment for commercial speech should be subject to the same level of judicial scrutiny as any restriction on communications in that category. Because I believe that the advertising scheme here fails that test, I respectfully dissent.

I

The nub of the Court's opinion is its reading of the line of cases following *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977):

> "*Abood*, and the cases that follow it, did not announce a broad First Amendment right not to be compelled to provide financial support for any organization that conducts expressive activities. Rather, *Abood* merely recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's 'freedom of belief.'" *Ante*, at 471 (quoting *Abood, supra*, at 235).

While I certainly agree with the Court that a proper understanding of *Abood* is necessary for the disposition of this case (and will dwell on the scope of its holding at some length below), it seems to me that *Abood* appears more readily in its proper size if we begin our analysis with two more basic principles of First Amendment law: that speech as such is subject to some level of protection unless it falls within a category, such as obscenity, placing it beyond the Amendment's scope, and that protected speech may not be made the subject of coercion to speak or coercion to subsidize speech.

A

Even before we first recognized commercial speech protection in *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976), we had stated a basic proposition of First Amendment protection, that "[a]ll ideas having even the slightest redeeming social importance . . . have the full protection of the guaranties [of the First Amendment]," *Roth* v. *United States*, 354 U. S. 476, 484 (1957). This premise was later echoed in *Virginia Bd. of Pharmacy*, where we asked whether commercial speech "is so removed from any exposition of ideas, and from truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, that it lacks all protection." 425 U. S., at 762 (citations and internal quotation marks omitted). The answer, of course, was no.

What stood against the claim of social unimportance for commercial speech was not only the consumer's interest in receiving information, *id.*, at 763–764, but the commercial speaker's own economic interest in promoting his wares. "[W]e may assume that the advertiser's interest is a purely economic one. That hardly disqualifies him from protection under the First Amendment." *Id.*, at 762. Indeed, so long as self-interest in providing a supply is as legitimate as the self-interest underlying an informed demand, the law could hardly treat the advertiser's economic stake as "utterly without redeeming social importance" and isolate the consumer's interest as the exclusive touchstone of commercial speech protection.

Nor is the advertiser's legitimate interest one-dimensional. While the value of a truthful representation of the product offered is central, advertising's persuasive function is cognizable, too. Like most advertising meant to stimulate demand, the promotions for California fruit at issue here do more than merely provide objective information about a product's availability or price; they exploit all the symbolic and emotional techniques of any modern ad campaign with messages often far removed from simple proposals to sell fruit.[1] "Speech has the capacity to convey complex substance, yielding various insights and interpretations depending upon the identity of the listener or the reader and the context of its transmission. . . . The complex nature of expression is one reason why even so-called commercial speech has become an essential part of the public discourse the First Amendment secures." *Florida Bar* v. *Went For It, Inc.*, 515 U. S. 618, 636 (1995) (KENNEDY, J., dissenting). Since persuasion is an essential ingredient of the competition that our public law promotes with considerable effort, the rhetoric of advertising cannot be written off as devoid of value or beyond protection, any more than can its power to inform. Of course, that value may well be of a distinctly lower order than the importance of providing accurate factual information, and the inextricable linkage between advertising and underlying commercial transaction "may give [the government] a concomitant interest in the expression itself," *Edenfield* v. *Fane*, 507 U. S. 761, 767 (1993) (citation and internal quotation marks omitted); see also *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484, 499 (1996) (opinion of STEVENS, J.). But these considerations amount to nothing more than the premise justifying a merely moderate level of scrutiny for commercial speech regulations generally: "the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Rubin* v. *Coors Brewing Co.*, 514 U. S. 476, 482 (1995) (citations and internal quotation marks omitted).

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[1] Thus, commercial advertising generally and these programs in particular involve messages that go well beyond the ideal type of pure commercial speech hypothesized in *Virginia Bd. of Pharmacy*, which would do "'no

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Since commercial speech is not subject to any categorical exclusion from First Amendment protection, and indeed is

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more than propose a commercial transaction,'" 425 U. S., at 762 (quoting *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376, 385 (1973)), by communicating the idea, "'I will sell you the X prescription drug at the Y price,'" 425 U. S., at 761.

protectible as a speaker's chosen medium of commercial enterprise, it becomes subject to a second First Amendment principle: that compelling cognizable speech officially is just as suspect as suppressing it, and is typically subject to the same level of scrutiny. In *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781 (1988), for example, the State argued that "the First Amendment interest in compelled speech is different [from] the interest in compelled silence," and ought therefore to merit a more "deferential test." *Id.*, at 796. We rejected that argument out of hand: "There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Id.*, at 796–797; see also *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 573 (1995) ("Since *all* speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say" (citations and internal quotation marks omitted)); *Wooley* v. *Maynard*, 430 U. S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all"); *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 633 (1943) ("[I]nvoluntary affirmation c[an] be commanded only on even more immediate and urgent grounds than silence").

As a familiar corollary to the principle that what may not be suppressed may not be coerced, we have recognized (thus far, outside the context of commercial speech) that individuals have a First Amendment interest in freedom from compulsion to subsidize speech and other expressive activities undertaken by private and quasi-private organizations.[2] We first considered this issue in *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977), in addressing the First Amendment claims of dissenting employees subject to an "agency-shop" agreement between their government employer and a union. The agreement required each employee to pay the union a "service fee" equal to the dues required of union members, but limited no one's right to speak separately and obliged no employee to join the union, personally espouse unionism, or participate in the union in any other way. *Id.*, at 212. Thus, as in this case, the sole imposition upon nonmembers was the assessment to help pay for the union's activities. And yet, purely financial as the imposition was, we held that the union's use of dissenters' service fees for expressive purposes unrelated to collective bargaining violated the First Amendment rights of those employees. In so holding, *Abood* drew together several lines of First Amendment doctrine; after recognizing the parallels between expression *per se* and associating for expressive purposes, *id.*, at 233–234, the Court relied on compelled-speech cases such as *Barnette, supra,* in concluding that just as the government may not (without a compelling reason) prohibit a person from contributing money to propagate ideas, neither may it force an individual to contribute money to support some group's distinctly expressive activities, *id.*, at 234–235. We have repeatedly adhered to this reasoning in cases of compelled contributions to unions in agency shops, see, *e. g., Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507 (1991); *Teachers* v. *Hudson*, 475 U. S. 292 (1986); *Ellis* v. *Railway Clerks*, 466 U. S.

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[2] The Secretary of Agriculture does not argue that the advertisements at issue represent so-called "government speech," with respect to which the Government may have greater latitude in selecting content than otherwise permissible under the First Amendment, see *Keller* v. *State Bar of Cal.*, 496 U. S. 1, 10–13 (1990); *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209, 259, n. 13 (1977) (Powell, J., concurring in judgment). See Brief for Petitioner 25, n. 16 (waiving argument).

435 (1984) (statutory case); *Machinists* v. *Street*, 367 U. S. 740 (1961) (statutory case anticipating *Abood*), and have followed the same rationale in holding that state-compelled dues to an integrated bar association may not constitutionally be used to advance political and ideological causes distinct from the core objectives of professional regulation, *Keller* v. *State Bar of Cal.*, 496 U. S. 1 (1990).

C

The Court recognizes the centrality of the *Abood* line of authority for resolving today's case, but draws the wrong conclusions from it. Since *Abood* struck down the mandatory "service fee" only insofar as it funded the union's expression of support for "ideological causes not germane to its duties as collective-bargaining representative," 431 U. S., at 235; see also *id.*, at 232, the Court reads *Abood* for the proposition that the First Amendment places no limits on government's power to force one individual to pay for another's speech, except when the speech in question both is ideological or political in character and is not germane to an otherwise lawful regulatory program. *Ante*, at 471–473.[3]

1

The Court's first mistaken conclusion lies in treating *Abood* as permitting any enforced subsidy for speech that is germane to permissible economic regulation, in the sense that it relates to the subject matter of the regulation and tends to further its objectives. But *Abood* and its subsequent line of cases are not nearly so permissive as the Court makes out. In *Abood,* we recognized that even in matters directly related to collective bargaining, compulsory funding of union activities has an impact on employees' First Amendment interests, since the employees might disagree with positions taken by the union on issues such as the inclusion of abortion in a medical benefit plan, or negotiating no-strike agreements, or even the desirability of unionism in general. 431 U. S., at 222. To be sure, we concluded that any interference with such interests was "constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Ibid.;* see also *Keller, supra,* at 13–14 ("[T]he State's interest in regulating the legal profession and improving the quality of legal services" justifies "the compelled association [inherent in the] integrated bar"). But this was simply a way of saying that the government's objective of guaranteeing the opportunity for a union shop, the importance and legitimacy of which were already settled, see *Abood, supra,* at 217–232 (following *Railway Employes* v. *Hanson,* 351 U. S. 225 (1956), and *Machinists* v. *Street, supra*), could not be attained without the incidental infringements of the interests in unfettered speech and association that petitioners there claimed. Collective bargaining, and related activities such as grievance arbitration and contract administration, are part and parcel of the very economic transactions between employees and employer that Congress can regulate, and which it could not regulate without these potential impingements on the employees' First Amendment interests. *Abood* is thus a specific instance of the general principle that government retains its full power to regulate commercial transactions directly, despite elements of speech and association inherent in such transactions. See *Ohralik* v. *Ohio State Bar Assn.,* 436 U. S. 447, 456 (1978) (commercial conduct may be regulated without offending First Amendment despite use of language); *Roberts* v. *United States Jaycees*, 468 U. S. 609, 634 (1984) (opinion of O'CONNOR, J., concurring in part and concurring in judgment) (in contrast to right of expressive association, "there is only minimal constitutional protection of the freedom of *commercial* association," because "the State is free to impose any rational regulation on the commercial transaction itself"); see also *New York State Club Assn., Inc.* v. *City of New York*, 487 U. S. 1, 13 (1988) (constitutional right of expressive association is not implicated by every instance in which individuals choose their associates); *Dallas* v. *Stanglin*, 490 U. S. 19, 25 (1989) (same); *Ellis* v. *Railway Clerks*, 466 U. S., at 456 (funding of union social activities, as opposed to expressive activities, has minimal connection with First Amendment rights).

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[3] That is, the Court appears to hold that a compelled subsidy of speech does not implicate the First Amendment if the speech either is germane to an otherwise permissible regulatory scheme or is nonideological, so that each of these characteristics constitutes an independent, sufficient criterion for upholding the subsidy. See, *e. g., ante*, at 473 ("[The *Abood*] test is clearly satisfied in this case because (1) the generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders and, (2) *in any event*, the assessments are not used to fund ideological activities" (emphasis added)).

Decisions postdating *Abood* have made clear, however, that its limited sanction for laws affecting First Amendment interests may not be expanded to cover every imposition that is in some way "germane" to a regulatory program in the sense of relating sympathetically to it. Rather, to survive scrutiny under *Abood*, a mandatory fee must not only be germane to some otherwise legitimate regulatory scheme; it must also be justified by vital policy interests of the government and not add significantly to the burdening of free speech inherent in achieving those interests. *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S., at 519; accord, *Ellis*, *supra*, at 456.

Thus, in *Lehnert* eight Justices concluded that a teachers' union could not constitutionally charge objecting employees for a public relations campaign meant to raise the esteem for teachers in the public mind and so increase the public's willingness to pay for public education. See 500 U. S., at 528–529 (plurality opinion); *id.*, at 559 (SCALIA, J., concurring in judgment in part and dissenting in part). "Expression of this kind extends beyond the negotiation and grievance-resolution contexts and imposes a substantially greater burden upon First Amendment rights than do [collective-bargaining functions].” *Id.,* at 528–529 (plurality opinion). The advertising campaigns here suffer from the same defect as the public relations effort to stimulate demand for the teachers’ product: a local union can negotiate a particular contract for the benefit of a shop’s whole labor force without globally espousing the virtues of teachers, and (in the absence of further explanation) produce markets can be directly regulated in the interest of stability and growth without espousing the virtues of fruit. They were, indeed, for a quarter century, and still are under the many agricultural marketing orders that authorize no advertising schemes. See *infra,* at 494–499. In each instance, the challenged burden on dissenters’ First Amendment rights is substantially greater than anything inherent in regulation of the commercial transactions. Thus, the *Abood* line does not permit this program merely because it is germane to the marketing orders.[4]

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[4] The Court purports to find support for its more permissive reading of the *Abood* “germaneness test” in a separate holding of *Lehnert* allowing mandatory charges for portions of the union’s internal newsletter, the Teachers’ Voice, that concerned “ ‘teaching and education generally, professional development, unemployment, job opportunities, award programs . . . , and other miscellaneous matters.’ ” *Ante,* at 473 (quoting *Lehnert* v. *Ferris Faculty Assn.,* 500 U. S. 507, 529 (1991)). But the *Lehnert* Court noted that these communications, though plainly speech, were not “public in nature,” *ibid.;* the Teachers’ Voice was the union’s means of communicating with its members, not the public at large, see *Lehnert* v. *Ferris Faculty Assn.-MEA-NEA,* 643 F. Supp. 1306, 1328 (WD Mich. 1986), aff’d, 881 F. 2d 1388 (CA6 1989), aff’d in part and rev’d in part on other grounds, 500 U. S. 507 (1991). In upholding charges for this type of internal communication, *Lehnert* simply followed our earlier decision in *Ellis* v. *Railway Clerks,* 466 U. S. 435 (1984), in which we reasoned that “[t]he union must have a channel for communicating with the employees, including the objecting ones, about its activities. [The union surely may] charge objecting employees for reporting to them about those activities it can charge them for doing.” *Id.,* at 450–451. In other words, this type of internal communication about chargeable activities, unlike the public advertising campaign struck down in *Lehnert,* was necessary to the union’s role as collective-bargaining agent and imposed no greater burden on the em-

2

The Court's second misemployment of *Abood* and its successors is its reliance on them for the proposition that when government neither forbids speech nor attributes it to an objector, it may compel subsidization for any objectionable message that is not political or ideological. But this, of course, is entirely at odds with the principle that speech significant enough to be protected at some level is outside the government's power to coerce or to support by mandatory subsidy without further justification. *Supra*, at 480–483. Since a commercial speaker (who does not mislead) may generally promote commerce as he sees fit, the government requires some justification (such as its necessity for otherwise valid regulation) before it may force him to subsidize commercial speech to which he objects. While it is perfectly true that cases like *Abood* and *Keller* did involve political or ideological speech, and the Court made reference to that character in explaining the gravity of the First Amendment interests at stake, nothing in those cases suggests that government has free rein to compel funding of nonpolitical speech (which might include art,[5] for example, as well as commercial advertising). While an individual's First Amendment interest in commercial speech, and thus the government's burden in justifying a regulation of it, may well be less weighty than the interest in ideological speech, *Abood* continues to stand for the proposition that being compelled to make expenditures

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ployees' First Amendment interests than their compelled association with the union in the first instance. In these respects, however, the instant advertising programs are much more like the impermissible public relations campaign than the permissible internal communications at issue in *Lehnert*.

[5] Cf. *Schad* v. *Mount Ephraim*, 452 U. S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee").

for protected speech "works no less an infringement of . . . constitutional rights" than being prohibited from making such expenditures. 431 U. S., at 234. The fact that no prior case of this Court has applied this principle to commercial and nonideological speech simply reflects the fortuity that this is the first commercial speech subsidy case to come before us.

3

An apparent third ground for the Court's conclusion that the First Amendment is not implicated here is its assumption that respondents do not disagree with the advertisements they object to subsidizing. See *ante*, at 470, 471. But this assumption is doubtful and would be beside the point even if true. As the Court itself notes, *ante*, at 467–468, and n. 11, respondents do claim to disagree with the messages of some promotions they are being forced to fund: some of the ads promote specific varieties of plums, peaches, and nectarines marketed by respondents' competitors but not by respondents; other ads characterize California tree fruits as a generic and thus fungible commodity, whereas respondents believe that their produce is superior to most grown in California. While these points of disagreement may seem trivial to the Court, they in fact relate directly to a vendor's recognized First Amendment interest in touting his wares as he sees fit, so long as he does not mislead. *Supra*, at 479. Whether the "central message," *ante*, at 470, of the generic advertising is that all California peaches, plums, and nectarines are equally good, or that only the varieties and characteristics featured in the advertisements are desirable, respondents do indeed disagree with that message.

In any event, the requirement of disagreement finds no legal warrant in our compelled-speech cases. In *Riley*, for example, we held that the free-speech rights of charitable solicitors were infringed by a law compelling statements of fact with which the objectors could not, and did not profess to, disagree. See 487 U. S., at 797–798. See also *Hurley*, 515 U. S., at 573 ("[The] general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid . . ."); *Barnette,* 319 U. S., at 635 (if the Free Speech Clause bars the government from making the flag salute a legal duty, nonconformist beliefs are not required to exempt one from saluting). Indeed, the *Abood* cases themselves protect objecting employees from being forced to subsidize ideological union activities unrelated to collective bargaining, without any requirement that the objectors declare that they disagree with the positions espoused by the union. See, *e. g., Teachers* v. *Hudson,* 475 U. S., at 301–302; *Abood,* 431 U. S., at 234. Requiring a profession of disagreement is likewise at odds with our holding two Terms ago that no articulable message is necessary for expression to be protected, *Hurley, supra,* at 569; protection of speech is not limited to clear-cut propositions subject to assent or contradiction, but covers a broader sphere of expressive preference. What counts here, then, is not whether respondents fail to disagree with the generalized message of the generic ads that California fruit is good, but that they do indeed deny that the general message is as valuable and worthy of their support as more particular claims about the merits of their own brands. One need not "disagree" with an abstractionist when buying a canvas from a representational painter; one merely wishes to support a different act of expression.

D

The Secretary of Agriculture has a further argument for minimizing or eliminating scrutiny of this subsidization mandate, which deserves some mention even though the Court does not adopt it. The Secretary calls for lesser scrutiny of forced payments for truthful advertising and promotion than for restrictions on commercial speech, on the ground that the effect of compelled funding is to increase the sum of information to the consuming public. This argument rests, however, on the assumption that regulation of commercial speech is justified solely or largely on preservation of public access to truthful information, an assumption we have already seen to be inaccurate. *Supra,* at 478–480. Truth is indeed a justifiable objective of commercial speech protection, but so is nonmisleading persuasion directed to the advertiser's own choice of what to promote.

Although not cited by the Secretary, the closest pass at authority for his limited rationale of commercial speech protection is *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U. S. 626 (1985), our only examination of a commercial speech mandate before today. The state law there required disclosures about the method of calculating a contingent fee when legal representation on that basis was advertised. In speaking of the objecting lawyer's comparatively modest interest in challenging the state requirement, we referred to protection of commercial speech as "justified principally by the value to consumers of the information such speech provides . . . ." *Id.,* at 651 (citation omitted); see also *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U. S., at 765, 770; *Rubin* v. *Coors Brewing Co.,* 514 U. S., at 481. But this proposition will not bear the weight of the Government's position. We said "principally," not exclusively, and proceeded to uphold the state requirement not because a regulation adding to public information is immune from scrutiny, but because the mandate at issue bore a reasonable relation to the "State's interest in preventing deception of consumers," 471 U. S., at 651, who might otherwise be ignorant of the real terms on which the advertiser intended to do business. *Zauderer* thereby reaffirmed a longstanding preference for disclosure requirements over outright bans, as more narrowly tailored cures for the potential of commercial messages to mislead by saying too little. See *id.,* at 651–652, n. 14; see also *Hurley, supra,* at 573; *Riley, supra,* at 796, n. 9; *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.,* 447

U. S. 557, 565 (1980); *Virginia Bd. of Pharmacy, supra,* at 771–772. But however long the pedigree of such mandates may be, and however broad the government's authority to impose them, *Zauderer* carries no authority for a mandate unrelated to the interest in avoiding misleading or incomplete commercial messages.

II

For the reasons discussed above, none of the Court's grounds suffices for discounting respondents' interests in expression here and treating these compelled advertising schemes as regulations of purely economic conduct instead of commercial speech. I would therefore adhere to the principle laid down in our compelled-speech cases: laws requiring an individual to engage in or pay for expressive activities are reviewed under the same standard that applies to laws prohibiting one from engaging in or paying for such activities. Under the test for commercial speech, the law may be held constitutional only if (1) the interest being pursued by the government is substantial, and (2) the regulation directly advances that interest and (3) is narrowly tailored to serve it. *Central Hudson, supra,* at 566.[6] The burden is on the government. *Edenfield* v. *Fane*, 507 U. S., at 770; *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 480 (1989). In this case, the Secretary has failed to establish that the challenged advertising programs satisfy any of these three prongs of the *Central Hudson* test.

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[6] Contrary to some arguments offered by respondents, these advertising schemes are not removed from the commercial category on the grounds that they are content based, producing not mere "dissemination of 'purely factual and uncontroversial information,'" *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U. S. 557, 573 (1995) (quoting *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U. S. 626, 651 (1985)), but controversial and ideological messages, and even objectionable sexual imagery. Regulation of commercial speech necessarily turns on some assessment of content, *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U. S. 748, 761 (1976), yet that fact has never been thought sufficient to require a standard of strict scrutiny. And we have consistently held that advertising does not automatically lose its character as commercial speech simply because it may do much more than propose a transaction or disseminate purely factual information. See, *e. g., Board of Trustees of State Univ. of N. Y.* v. *Fox,* 492 U. S. 469, 473–475 (1989); *Bolger* v. *Youngs Drug Products*

A

The express purposes of the Agricultural Marketing Agreement Act of 1937 (AMAA or Act), 7 U. S. C. §601 *et seq.*, including the advertising programs established under it, are to stabilize markets for covered agricultural products and maintain the prices received by farmers. §§602(1), (4); see also Federal Agriculture Improvement and Reform Act of 1996 (FAIR Act) §§501(b)(1), (3), Pub. L. 104–127, 110 Stat. 888, 1030 (finding by Congress that the purpose of agricultural commodity promotion laws is to maintain and expand the market for covered commodities).[7] It is doubtless true that at a general level these are substantial government interests, and unless there were some reason to doubt that undue market instability or income fluctuation has in fact affected a given segment of the economy, governmental

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Corp., 463 U. S. 60, 66–68 (1983). The concept of commercial speech would be reduced to a relic if the threshold for imposing strict scrutiny were reached simply because certain advertisements evoke vaguely nostalgic themes of indeterminate political import or because the hypersensitive may see the specter of sex in the film of a child eating a peach.

[7] A subtitle of the FAIR Act, which was enacted on April 4, 1996, authorizes promotion and advertising orders for any agricultural commodity. Its procedural mechanisms are similar to those put in place by the AMAA, although there is one noticeable difference (other than breadth of coverage) between the two laws: orders issued under the FAIR Act, unlike those under the AMAA, must be national in scope. FAIR Act §§511–526, 110 Stat. 1032–1048. The FAIR Act does not, however, affect or pre-empt any other federal or state law, such as the AMAA, authorizing promotion or research relating to an agricultural commodity. §524, *id.*, at 1047. The FAIR Act also includes new findings in support of "commodity promotion laws," including the advertising provisions of the AMAA. §501, *id.*, at 1029.

efforts to address such problems would require little to satisfy the first *Central Hudson* criterion that a substantial government interest be the object of the regulation. Thus, if the Government were to attack these problems across an interstate market for a given agricultural commodity or group of them, the substantiality of the national interest would not be open to apparent question, and the sole issues under *Central Hudson* would seem to be whether the means chosen were sufficiently direct and well tailored. But when the government's program targets expression in only a narrow band of a broad spectrum of similar market activities in which its interests appear to be at stake, a question naturally does arise. For the arbitrariness or underinclusiveness of the scheme chosen by the government may well suggest that the asserted interests either are not pressing or are not the real objects animating the restriction on speech. See *Rubin* v. *Coors Brewing Co.*, 514 U. S., at 489 ("[E]xemptions and inconsistencies" in alcohol labeling ban "bring into question the purpose of the . . . ban," such that it does not survive the *Central Hudson* test); *City of Ladue* v. *Gilleo*, 512 U. S. 43, 52–53 (1994) ("Exemptions from an otherwise legitimate regulation of a medium of speech . . . may diminish the credibility of the government's rationale for restricting speech in the first place"); *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. 410, 424–426 (1993) (same); *Florida Star* v. *B. J. F.*, 491 U. S. 524, 540 (1989) ("[T]he facial underinclusiveness" of a regulation of speech "raises serious doubts about whether Florida is, in fact, serving, with this statute, the significant interests" invoked in support of it). Under such circumstances, the government's obligation to establish the empirical reality of the problems it purports to be addressing, see *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 664 (1994); *Edenfield* v. *Fane*, *supra*, at 770–771, requires a sensible reason for drawing the line between those instances in which the government burdens First Amendment freedom in the name of the asserted interest and those in which it does not.

Here, the AMAA's authorization of compelled advertising programs is so random and so randomly implemented, in light of the Act's stated purposes, as to unsettle any inference that the Government's asserted interest is either substantial or even real. First, the Act authorizes paid advertising programs in marketing orders for 25 listed fruits, nuts, vegetables, and eggs, but not for any other agricultural commodity. See 7 U. S. C. § 608c(6)(I).[8] The list includes onions but not garlic, tomatoes but not cucumbers, Tokay grapes but not other grapes, and so on. The selection is puzzling. The only thing the limited list unambiguously shows is that a need for promotional control does not go hand-in-hand with a need for market and economic stability, since the authorization for marketing orders bears no such narrow restriction to specific types of produce. But no general criterion for selection is stated in the text, and neither Congress nor the Secretary has so much as suggested that such a criterion exists. Instead, the legislative history shows that from time to time Congress has simply amended the Act to add particular commodities to the list at the request of interested producers or handlers, without ever explaining why compelled advertising programs were necessary for the specific produce chosen and not others.[9] The legislative history for the bill authorizing paid advertising programs for plums, nectarines, and several other commodities is a good case on point. The record indicates merely that "[o]ver the past several years, numerous commodity groups have come to the Congress and asked for authority to provide for [market development and advertising] activities under the terms of their agreement and it has always been granted. This bill combines several such individual requests made by various producer groups operating under marketing agreements or orders." H. R. Rep. No. 89–846, 89th Cong., 1st Sess., 2 (1965). A letter from the Acting Secretary of Agriculture appended to the cited House Report similarly accounts for the choice of covered products solely by reference to grower and handler interest. *Id.*, at 3–4. Or, again, the legislative history of the amendment adding "California-grown peaches" to the list refers only to the view of the Department of Agriculture that "any fruit or vegetable commodity group which actively supports the development of a promotion program by this means should be given an opportunity to do so." S. Rep. No. 92–295, p. 2 (1971). Nor do the proposed rulemakings for authorizing advertising programs in marketing orders carry findings that might explain why such programs might be needed for the specified commodities but not others; the announcements rely instead on a "consensus of the industry . . . that promotional activities . . . have been beneficial in increasing demand," 36 Fed. Reg. 8736 (1971) (plums); see also 41 Fed. Reg. 14376–14377 (1976) (peaches).[10]

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[8] Section 608c(6)(I) currently provides that marketing orders may include terms "[e]stablishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order: *Provided*, That with respect to orders applicable to almonds, filberts (otherwise known as hazelnuts), California-grown peaches, cherries, papayas, carrots, citrus fruits, onions, Tokay grapes, pears, dates, plums, nectarines, celery, sweet corn, limes, olives, pecans, eggs, avocados, apples, raisins, walnuts, tomatoes, or Florida-grown strawberries, such projects may provide for any form of marketing promotion including paid advertising and with respect to almonds, filberts (otherwise known as hazelnuts), raisins, walnuts, olives, and Florida Indian River grapefruit may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order . . . ."

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[9] The substantive terms of marketing orders under the AMAA as originally enacted were generally limited to restrictions on the total marketable quantity of the commodity, allocations among handlers, disposition of surplus quantities, and maintenance of reserve supplies. 7 U. S. C. §608c(6) (1934 ed., Supp. III). For the first time in 1954, Congress permitted marketing orders to establish "marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption [of a] commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order." 68 Stat. 906; 7 U. S. C. §608c(6)(I). Since then, Congress has repeatedly amended the Act to authorize, but only for specified commodities, "any form of marketing promotion including paid advertising." *Ibid.* The first such amendment, in 1962, allowed advertising programs for cherries, Pub. L. 87–703, 76 Stat. 632; similar schemes for plums and nectarines followed in 1965, Pub. L. 89–330, 79 Stat. 1270, and for "California-grown peaches" in 1971, Pub. L. 92–120, 85 Stat. 340; and today, various authorizations cover the 25 commodities listed in §608c(6)(I). The Act now also permits crediting some or all of a handler's independent expenditures for advertising against his assessment obligations with respect to six commodities (but not nectarines, plums, or peaches). *Ibid.*

Of course, when government goes no further than regulating the underlying economic activity, this sort of piecemeal legislation in answer to expressions of interest by affected parties is plainly permissible, short of something so arbitrary as to fail the rational basis test. See, *e. g., Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483, 487–489 (1955). But when speech is at stake, the government fails to carry its burden of showing a substantial interest when it does nothing more than refer to a "consensus" within a limited interest group that wants the regulation. Instead, the erratic pattern of regulation itself places the reality of any public or governmental interest in question, and a correlation with nothing more than the priorities of particular interest groups gives no reassuring answer.[11]

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[10] A possible exception is the proposed rulemaking for nectarines, which refers to the relative unfamiliarity of the consuming public with nectarines, due in part to the fact that new varieties that could be marketed nationally had only recently been developed. See 31 Fed. Reg. 5635, 5636 (1966). This solitary finding does not cure the other defects of the statutory scheme, however.

[11] This does not mean that taking the views of the industry into account in itself renders a program suspect. Both the AMAA and the more general authorization of compelled agricultural advertising programs recently enacted as part of the FAIR Act require orders implementing such programs to be approved by producers and/or handlers in periodic referenda. See 7 U. S. C. §§ 608c(8)(A), (B), (9)(B)(i), (16), (19); FAIR Act § 518, 110

A second element of the arbitrary in this statutory and regulatory scheme inheres in the geographical limitations on the marketing orders that include the advertising programs challenged in this case, which apply only to peaches, plums, and nectarines grown in California, unaccompanied by counterparts for advertising the same commodities grown elsewhere. Some geographical restriction, it must be said, follows from the general provision of the AMAA limiting marketing orders to the smallest production or marketing area practicable and consistent with the policy of the Act. See 7 U. S. C. § 608c(11)(B). But this provision merely explains why a substantial governmental interest in advertising a type of produce would have to be manifested in as many orders under the AMAA as there are defined production or marketing areas; it does nothing to explain the oddity that a Government interest worth vindicating should occur within such geographically select boundaries and nowhere else, or to negate the suggestion of the evidence already mentioned, that the Government's asserted interest is nothing more than the preference of a local interest group.

The oddity is most pronounced in the instance of peaches, since the statute itself authorizes forced advertising only in marketing orders for "California-grown peaches," not in orders for peaches grown anywhere else in the country. § 608c(6)(I). Although California is the biggest peach-growing State, more than 30 others also grow peaches commercially and together typically account for about half of the

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Stat. 1043–1044. Since the asserted purpose of these advertising schemes is to increase demand for the covered commodities and thereby maintain the income of producers and handlers, requiring periodic approval by those most likely to benefit if a program is working as planned may serve as an additional check on whether the purpose of the program is in fact being achieved. Contrary to what the majority implies, see *ante,* at 476–477, however, the mere vote of a majority is never enough to compel dissenters to pay for private or quasi-private speech whose message they do not wish to foster; otherwise, the First Amendment would place no limitation on this type of majoritarian action.

national crop, and roughly two-thirds of the peaches sold fresh. See App. 389; U. S. Dept. of Agriculture, Agricultural Statistics, 1995–96, p. V–23 (Table 294). Yet the non-California peaches are utterly ignored in the Government's promotional orders. The challenged advertising campaign for "California Summer Fruits," running in markets throughout the United States and in Canada, see App. 341–343, 477–479, does not proclaim simply that peaches or the other fruits are good things. Rather, as the Secretary tells us, the advertising program "promotes California fruit as unique." Brief for Petitioner 31. It may or may not be, but promoting a crop from one State at the expense of essentially the same thing grown in the others reveals nothing about a substantial national interest justifying the National Government in restricting speech. Without more, the most reasonable inference is not of a substantial Government interest, but effective politics on the part of producers who see the chance to spread their advertising costs. Nothing more appears.[12]

The Secretary makes no attempt to explain how the Act's geographical scope restrictions relate to the asserted goals of the advertising programs. The general restriction of marketing orders to the smallest practicable area has been part of the Act since it became law, long before Congress permitted compelled advertising, the authorization for which was simply grafted onto the existing Act as a convenient vehicle for the funding schemes. See n. 9, *supra;* see also S. Rep. No. 92–295, *supra,* at 2 (letter from Department of Agriculture indicating that the AMAA "could provide the facility for" financing commodity advertising programs).

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[12] While plum and nectarine production is more highly concentrated in California, see U. S. Dept. of Agriculture, Agricultural Statistics, 1995–96, pp. V–21, V–27 to V–28 (Tables 288, 304–308), the AMAA's requirement that marketing orders cover the smallest geographical area practicable still lacks any reasonable connection to the asserted purposes of the advertising programs instituted thereunder.

Nor does any explanation appear for restricting peach advertising programs to California produce. Without some explanation, one would expect something quite different, that a compelled advertising program of the National Government intended to increase consumer demand for an agricultural commodity would apply to produce grown throughout the land. Indeed, in recently enacting the FAIR Act, which authorizes compulsory advertising programs for all agricultural commodities on a national basis (but also leaves the separate provisions of the AMAA intact, see § 524, 110 Stat. 1047), Congress specifically found that "[t]he cooperative development, financing, and implementation of a coordinated *national* program of research, promotion, and information regarding agricultural commodities are necessary to maintain and expand existing markets and to develop new markets for these commodities." § 512(a)(7), *id.*, at 1033 (emphasis added); see also § 514(a)(2), *id.*, at 1035 ("Each order issued under this section shall be national in scope"). The AMAA, of course, actually prohibits orders of national scope. In sum, these advertising schemes come with a statutory text and regulatory history so remote from the Government's asserted interests as to undermine the reality, let alone the substantiality, of the claims put forward by the Secretary in attempting to satisfy *Central Hudson*'s first requirement.

B

Even if the Secretary could establish a sufficiently substantial interest, he would need also to show how the compelled advertising programs directly advance that interest, that is, how the schemes actually contribute to stabilizing agricultural markets and maintaining farm income by stimulating consumer demand. To show this required causation, the Secretary relies on cases concerning governmental bans on particular advertising content, where we have accepted the unremarkable presumption that advertising actually works to increase consumer demand, so that limiting advertising tends to soften it. See *United States* v. *Edge Broadcasting Co.*, 509 U. S. 418, 428 (1993); *Posadas de Puerto Rico Associates* v. *Tourism Co. of P. R.*, 478 U. S. 328, 341–342 (1986); *Central Hudson*, 447 U. S., at 569. This presumption is not, however, automatically convertible into support for the Secretary here. In the cases mentioned, the question has been whether some advertising (in the absence of the government's ban) would be more effective in stimulating demand than no advertising (due to the ban). Here, in contrast, the causal question of direct advancement does not involve comparing the effectiveness of something with nothing, for even without the coercive promotional schemes there would be some voluntary advertising. Thus, the question here requires a comparison of the effectiveness of advertising under the Government's program with the effectiveness of whatever advertising would likely exist without it.[13]

For this purpose, the Secretary correctly notes that the effectiveness of the Government's regulation must be viewed overall, considering the market behavior of growers and handlers generally, not just in its isolated application to one or a few individuals such as respondents. *Edge Broadcasting*, *supra*, at 427. The Secretary therefore argues that though respondents have voiced the desire to do more individual advertising if the system of mandatory assessments were ended, other handlers who benefit from the Government's program might well become "free riders" if promotion were to become wholly voluntary, to the point of cutting the sum total of advertising done. That might happen. It is also reasonably conceivable, though, that pure self-interest would keep the level of voluntary advertising high enough that the mandatory program could only be seen as affecting the details of the ads or shifting their costs, in either event without effect on market stability or income to producers as a group.[14] We, of course, do not know, but these possibilities alone should be fatal to the Government here, which has the burden to establish the factual justification for ordering a subsidy for commercial speech. Mere speculation about one or another possibility does not carry the burden, see *Turner Broadcasting System*, 512 U. S., at 664; *Edenfield* v. *Fane*, 507 U. S., at 770–771, and the Government has to show that its mandatory scheme appreciably increases the total amount of advertising for a commodity or somehow does a better job of sparking the right level of consumer demand than a wholly voluntary system would. There is no evidence of this in the record here.

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[13] Although they do not apply the *Central Hudson* test, the majority does criticize the Court of Appeals' application of it as "illogical" insofar as that court enquired whether collective advertising or purely private advertising is more effective at stabilizing markets, because the Act's basic policy is to achieve its economic goals by compelling cooperation in lieu of independent, competitive decisionmaking. *Ante*, at 474–475. But the extent to which the Act eliminates competition varies among different marketing orders, and the spottiness of collective advertising schemes under the Act demonstrates that there is no necessary connection between some compelled economic cooperation and forced collective advertising. There is thus nothing "illogical" in comparing the effectiveness of collective and private advertising schemes in the context of the marketing order regime.

C

Finally, a regulation of commercial speech must be narrowly tailored to achieving the government's interests; there must be a " 'fit' between the legislature's ends and the means chosen to accomplish those ends,—a fit . . . that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Board of Trustees of State Univ. of N. Y.* v. *Fox,* 492 U. S., at 480 (citations and internal quotation marks omitted). This sense of fitness is not precise, to be sure, but it rules out a regulation if "far less restrictive and more precise means" are available. *Id.,* at 479 (internal quotation marks omitted). Respondents argue that the mandatory advertising schemes for California peaches, plums, and nectarines fail this narrow tailoring requirement, because they deny handlers any credit toward their assessments for some or all of their individual advertising expenditures. The point is well taken. On its face, at least, a credit system would be a far less restrictive and more precise way to achieve the Government's stated interests, eliminating as it would much of the burden on respondents' speech without diminishing the total amount of advertising for a particular commodity. Indeed, the remarkable thing is that the AMAA itself provides for exactly such credits for individual advertising expenditures under marketing orders for almonds, filberts, raisins, walnuts, olives, and Florida Indian River grapefruit, but not for other commodities. 7 U. S. C. § 608c(6)(I).

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[14] While even on the cost-shifting scenario the Government would have reduced the "problem" of free riders referred to by the Secretary, that would not be a sufficient freestanding justification for the program. "[P]rivate speech often furthers the interests of nonspeakers, and that does not alone empower the state to compel the speech to be paid for," *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S., at 556 (SCALIA, J., concurring in judgment in part and dissenting in part). We have never sustained a restriction on speech solely because some individuals would ride free on the private speech of others, but only when the free-rider problem arises in serving other substantial governmental interests.

The Secretary contends, however, that the purpose of individual "branded" advertising is to increase the market share of a single handler, and so is at odds with the purpose of the Government's mandatory program, which is to expand the overall size of the market through the use of "generic" advertising for a commodity generally. See also FAIR Act §§ 501(b)(6), (7), 110 Stat. 1030–1031 (congressional finding of same). Perhaps so, but that does not tell us what to make of the credit for, say, private raisin advertising. It would be hard to imagine more effectively "branded" advertising than promotions for Sun-Maid raisins, but the statute would allow Sun-Maid a credit. Why would that be consistent with the Government's generic objective, but a credit for respondents' nectarine ads not be? The Government gives us no answer. Without some further explanation, the statute on raisin advertising seems to reflect a conclusion that could reasonably be drawn after examining some of the "branded" advertising in the record before us. A consumer galvanized by respondents' depiction of "Mr. Plum," App. 542, might turn down a plum by any other name, but I doubt it.[15]

I acknowledge that in implementing a credit program for individual advertising in an otherwise valid compulsory program, the Government would need substantial leeway in determining whether such expenditures do in fact further the goal of expanding markets generally. But where, as here, no particular evaluation has been made, and the statute dealing with other fruit apparently assumes that some private advertising does serve the common good, and everything else is left to assertion, there could be no finding that a program completely denying credits for all individual advertising expenditures is narrowly tailored to an interest in the stability or expansion of overall markets for a commodity.

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[15] The Secretary also maintains that credit programs are appropriate for market conditions specific to the almond industry, where a single producer cooperative has a 92% share of the market for direct sales to consumers, see *Cal-Almond, Inc.* v. *United States Dept. of Agriculture*, 14 F. 3d 429, 438, n. 9 (CA9 1993), because in such circumstances "certain types of individual and brand advertising may accomplish the government's goals of market stability and increased consumption without creating a significant free-rider problem." Brief for Petitioner 47. As with the Secretary's other proffered justifications for the seemingly arbitrary choices made in the AMAA provisions concerning advertising, this explanation rests on nothing more than an unsubstantiated assertion, here about the effects of brand advertising. Moreover, the legislative and regulatory history provides no indication that this was the reason for permitting credits for almonds, but not plums, nectarines, or California-grown peaches. To the extent the record says anything, it seems to say quite the contrary of what the Secretary claims. See S. Rep. No. 91–1204, p. 2 (1970) (incorporating letter from Almond Growers Council noting that credit provision for almonds "will be model legislation for other commodities"); 37 Fed. Reg. 3983 (1972). The Secretary's explanation only leads one to wonder about filberts, for example; is their production, too, under the domination of a large cooperative? Is the grapefruit market structured in a way that renders virtually generic the brand-specific advertising for the Indian River crop?

* * *

Although the government's obligation is not a heavy one in *Central Hudson* and the cases that follow it, we have understood it to call for some showing beyond plausibility, and there has been none here. I would accordingly affirm the judgment of the Ninth Circuit.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins as to Part II, dissenting.

I

I join JUSTICE SOUTER's dissent, with the exception of Part II. My join is thus limited because I continue to disagree with the use of the *Central Hudson* balancing test and the discounted weight given to commercial speech generally. See *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484, 518–528 (1996) (THOMAS, J., concurring in part and concurring in judgment) (criticizing *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980)). Because the regulation at issue here fails even the more lenient *Central Hudson* test, however, it, *a fortiori*, would fail the higher standard that should be applied to all speech, whether commercial or not.

II

I write separately to note my disagreement with the majority's conclusion that coerced funding of advertising by others does not involve "speech" at all and does not even raise a First Amendment "issue." See *ante*, at 469–474. It is one thing to differ about whether a particular regulation involves an "abridgment" of the freedom of speech, but it is entirely another matter—and a complete repudiation of our precedent—for the majority to deny that "speech" is even at issue in this case.

In numerous cases, this Court has recognized that paying money for the purposes of advertising involves speech.[1] The Court also has recognized that compelling speech raises a First Amendment issue just as much as restricting speech.[2] Given these two elemental principles of our First Amendment jurisprudence, it is incongruous to suggest that forcing fruitgrowers to contribute to a collective advertising campaign does not even *involve* speech, while at the same time effectively conceding that forbidding a fruitgrower to make those same contributions voluntarily would violate the First Amendment. Compare *ante,* at 470 (promotional regulations should be scrutinized under the same standard as other anticompetitive aspects of the marketing orders), with *ante,* at 469, and n. 12 (distinguishing this case as not involving a "restraint" on any producer's freedom to communicate with any audience). Yet, that is precisely what the majority opinion does.[3]

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[1] See *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.,* 447 U. S. 557 (1980) (advertising to promote the use of electricity is speech); *First Nat. Bank of Boston* v. *Bellotti,* 435 U. S. 765 (1978) (corporate advertising regarding referendum); *Abood* v. *Detroit Bd. of Ed.,* 431 U. S. 209 (1977) *(per curiam)* (payment of dues used to engage in speech); *Buckley* v. *Valeo,* 424 U. S. 1 (1976) (contributions for political advertising).

[2] See *Turner Broadcasting System, Inc.* v. *FCC,* 520 U. S. 180 (1997) (coerced carriage of broadcast signals over cable television facilities); *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n of Cal.,* 475 U. S. 1 (1986) (coerced inclusion of private messages in utility bill envelopes); *PruneYard Shopping Center* v. *Robins,* 447 U. S. 74 (1980) (coerced creation of a speaker's forum on private property); *Abood* v. *Detroit Bd. of Ed., supra* (coerced payment of dues used to engage in speech); *Wooley* v. *Maynard,* 430 U. S. 705 (1977) (coerced display of state license plate); *Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S. 241 (1974) (coerced right of reply to newspaper editorials); *West Virginia Bd. of Ed.* v. *Barnette,* 319 U. S. 624 (1943) (coerced Pledge of Allegiance).

[3] The majority's grounds for distinguishing certain of our precedents are, to say the least, unpersuasive and contradictory, as JUSTICE SOUTER's dissent amply demonstrates. Moreover, the majority's excessive emphasis on the supposed collectivization of the fruit industry, *ante,* at 469, 474–477, likewise fails to support its conclusion. Although the Constitution

What we are now left with, if we are to take the majority opinion at face value, is one of two disturbing consequences: Either (1) paying for advertising is not speech at all, while such activities as draft card burning, flag burning, armband wearing, public sleeping, and nude dancing are,[4] or (2) compelling payment for third-party communication does not implicate speech, and thus the Government would be free to force payment for a whole variety of expressive conduct that it could not restrict. In either case, surely we have lost our way.

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may not "enact Mr. Herbert Spencer's Social Statics," *Lochner* v. *New York,* 198 U. S. 45, 75 (1905) (Holmes, J., dissenting), and thus the Government has a considerable range of authority in regulating the Nation's economic structure, part of the Constitution—the First Amendment—does enact a distinctly individualistic notion of "the freedom of speech," and Congress may not simply collectivize that aspect of our society, regardless of what it may do elsewhere.

[4] See *United States* v. *O'Brien,* 391 U. S. 367 (1968) (draft card burning); *Texas* v. *Johnson,* 491 U. S. 397 (1989) (flag burning); *Tinker* v. *Des Moines Independent Community School Dist.,* 393 U. S. 503 (1969) (armbands); *Clark* v. *Community for Creative Non-Violence,* 468 U. S. 288 (1984) (prohibition on sleeping in park raises First Amendment issues); *Schad* v. *Mount Ephraim,* 452 U. S. 61 (1981) (nude dancing).

CITY OF BOERNE *v.* FLORES, ARCHBISHOP OF SAN ANTONIO, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 95–2074. Argued February 19, 1997—Decided June 25, 1997

Respondent, the Catholic Archbishop of San Antonio, applied for a building permit to enlarge a church in Boerne, Texas. When local zoning authorities denied the permit, relying on an ordinance governing historic preservation in a district which, they argued, included the church, the Archbishop brought this suit challenging the permit denial under, *inter alia*, the Religious Freedom Restoration Act of 1993 (RFRA). The District Court concluded that by enacting RFRA Congress exceeded the scope of its enforcement power under § 5 of the Fourteenth Amendment. The court certified its order for interlocutory appeal, and the Fifth Circuit reversed, finding RFRA to be constitutional.

Held: RFRA exceeds Congress' power. Pp. 512–536.

(a) Congress enacted RFRA in direct response to *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, in which the Court upheld against a free exercise challenge a state law of general applicability criminalizing peyote use, as applied to deny unemployment benefits to Native American Church members who lost their jobs because of such use. In so ruling, the Court declined to apply the balancing test of *Sherbert* v. *Verner*, 374 U. S. 398, which asks whether the law at issue substantially burdens a religious practice and, if so, whether the burden is justified by a compelling government interest. RFRA prohibits "[g]overnment" from "substantially burden[ing]" a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that . . . interest." 42 U. S. C. § 2000bb–1. RFRA's mandate applies to any branch of Federal or State Government, to all officials, and to other persons acting under color of law. § 2000bb–2(1). Its universal coverage includes "all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [RFRA's enactment]." § 2000bb–3(a). Pp. 512–516.

(b) In imposing RFRA's requirements on the States, Congress relied on the Fourteenth Amendment, which, *inter alia*, guarantees that no State shall make or enforce any law depriving any person of "life, liberty, or property, without due process of law," or denying any person the "equal protection of the laws," § 1, and empowers Congress "to enforce" those guarantees by "appropriate legislation," § 5. Respondent Archbishop and the United States contend that RFRA is permissible enforcement legislation under § 5. Although Congress certainly can enact legislation enforcing the constitutional right to the free exercise of religion, see, *e. g., Cantwell* v. *Connecticut,* 310 U. S. 296, 303, its § 5 power "to enforce" is only preventive or "remedial," *South Carolina* v. *Katzenbach,* 383 U. S. 301, 326. The Amendment's design and § 5's text are inconsistent with any suggestion that Congress has the power to decree the substance of the Amendment's restrictions on the States. Legislation which alters the Free Exercise Clause's meaning cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect. The need to distinguish between remedy and substance is supported by the Fourteenth Amendment's history and this Court's case law, see, *e. g., Civil Rights Cases,* 109 U. S. 3, 13–14, 15; *Oregon* v. *Mitchell,* 400 U. S. 112, 209, 296. The Amendment's design has proved significant also in maintaining the traditional separation of powers between Congress and the Judiciary, depriving Congress of any power to interpret and elaborate on its meaning by conferring self-executing substantive rights against the States, cf. *id.,* at 325, and thereby leaving the interpretive power with the Judiciary. Pp. 516–529.

(c) RFRA is not a proper exercise of Congress' § 5 enforcement power because it contradicts vital principles necessary to maintain separation of powers and the federal-state balance. An instructive comparison may be drawn between RFRA and the Voting Rights Act of 1965, provisions of which were upheld in *Katzenbach, supra,* and subsequent voting rights cases. In contrast to the record of widespread and persisting racial discrimination which confronted Congress and the Judiciary in those cases, RFRA's legislative record lacks examples of any instances of generally applicable laws passed because of religious bigotry in the past 40 years. Rather, the emphasis of the RFRA hearings was on laws like the one at issue that place incidental burdens on religion. It is difficult to maintain that such laws are based on animus or hostility to the burdened religious practices or that they indicate some widespread pattern of religious discrimination in this country. RFRA's most serious shortcoming, however, lies in the fact that it is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections, proscribing state conduct that the Fourteenth Amendment itself does not prohibit. Its sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. Its restrictions apply to every government agency and official, § 2000bb–2(1), and to all statutory or other law, whether adopted before or after its enactment, § 2000bb–3(a). It has no termination date or termination mechanism. Any law is subject to challenge at any time by any individual who claims a substantial burden on his or her free exercise of religion. Such a claim will often be difficult to contest. See *Smith, supra,* at 887. Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. 494 U. S., at 888. Furthermore, the least restrictive means requirement was not used in the pre-*Smith* jurisprudence RFRA purported to codify. All told, RFRA is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens, and is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion. Pp. 529–536.

73 F. 3d 1352, reversed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, THOMAS, and GINSBURG, JJ., joined, and in which SCALIA, J., joined as to all but Part III–A–1. STEVENS, J., filed a concurring opinion, *post,* p. 536. SCALIA, J., filed an opinion concurring in part, in which STEVENS, J., joined, *post,* p. 537. O'CONNOR, J., filed a dissenting opinion, in which BREYER, J., joined except as to the first paragraph of Part I, *post,* p. 544. SOUTER, J., *post,* p. 565, and BREYER, J., *post,* p. 566, filed dissenting opinions.

Marci A. Hamilton argued the cause for petitioner. With her on the briefs were *Lowell F. Denton* and *Gordon L. Hollon.*

Jeffrey S. Sutton, State Solicitor of Ohio, argued the cause for the State of Ohio et al. as *amici curiae* urging reversal. With him on the brief were *Betty D. Montgomery,* Attorney General of Ohio, *Robert C. Maier* and *Todd Marti,* Assistant Attorneys General, and the Attorneys General for their respective jurisdictions as follows: *Malaetasi M. Togafau* of American Samoa, *Grant Woods* of Arizona, *Gale A. Norton* of Colorado, *M. Jane Brady* of Delaware, *Robert Butterworth* of Florida, *Calvin Holloway, Sr.,* of Guam, *Margery S. Bronster* of Hawaii, *Alan G. Lance* of Idaho, *Mike Moore* of Mississippi, *Frankie Sue Del Papa* of Nevada, *Jeffrey R. Howard* of New Hampshire, *Michael F. Easley* of North Carolina, *W. A. Drew Edmondson* of Oklahoma, *Thomas W. Corbett, Jr.,* of Pennsylvania, and *Julio A. Brady* of the Virgin Islands.

Douglas Laycock argued the cause for respondent Flores. With him on the brief were *Thomas Drought* and *Patricia J. Schofield.* *Acting Solicitor General Dellinger* argued the cause for the United States. With him on the brief were *Assistant Attorney General Hunger, Deputy Solicitor General Waxman, Patricia A. Millett,* and *Michael Jay Singer.**

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*Briefs of *amici curiae* urging reversal were filed for the Commonwealth of Virginia by *James S. Gilmore II,* Attorney General, *David E. Anderson,* Chief Deputy Attorney General, *William Henry Hurd,* Deputy Attorney General, and *Lee E. Goodman;* for the Clarendon Foundation by *Ronald D. Maines* and *Jay S. Bybee;* for the National Right to Work Legal Defense Foundation, Inc., by *Bruce N. Cameron;* and for the San Antonio Conservation Society et al. by *Robert A. Long, Jr.,* and *Ivan K. Fong.*

Briefs of *amici curiae* urging affirmance were filed for the State of Maryland et al. by *J. Joseph Curran, Jr.,* Attorney General of Maryland, *Jack Schwartz* and *Steven M. Sullivan,* Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Richard Blumenthal* of Connecticut, *Scott Harshbarger* of Massachusetts, and *Dennis C. Vacco* of New York; for members of the Virginia House of Delegates et al. by *Mitchell A. Karlan;* for Senator Orrin G. Hatch et al. by *Carter G. Phillips* and *Gene C. Schaerr;* for Senator Edward M. Kennedy et al. by *Clifford M. Sloan;* for the American Bar Association by *N. Lee Cooper, Stuart H. Newberger,* and *Joseph N. Onek;* for the American Center for Law and Justice by *Jay Alan Sekulow, James M. Henderson, Sr., Walter M. Weber, Keith A. Fournier,* and *John G. Stepanovich;* for the Beckett Fund for Religious Liberty by *Kevin J. Hasson;* for the Church of Jesus

JUSTICE KENNEDY delivered the opinion of the Court.*

A decision by local zoning authorities to deny a church a building permit was challenged under the Religious Freedom Restoration Act of 1993 (RFRA or Act), 107 Stat. 1488, 42 U. S. C. § 2000bb *et seq.* The case calls into question the authority of Congress to enact RFRA. We conclude the statute exceeds Congress' power.

I

Situated on a hill in the city of Boerne, Texas, some 28 miles northwest of San Antonio, is St. Peter Catholic Church. Built in 1923, the church's structure replicates the mission

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Christ of Latter-day Saints by *W. Cole Durham, Jr., James A. Serritella, James C. Geoly, Kevin R. Gustafson,* and *Von G. Keetch;* for the Coalition for the Free Exercise of Religion by *Marc D. Stern, Oliver S. Thomas, J. Brent Walker, Melissa Rogers, Steven T. McFarland, Samuel Rabinove, Richard Foltin, David Zwiebel, Steven R. Shapiro, Steven K. Green,* and *Jack F. Trope;* for the Defenders of Property Rights et al. by *Nancie G. Marzulla;* for the Minnesota Family Council et al. by *Jordan W. Lorence;* for the NAACP Legal Defense and Educational Fund, Inc., by *Elaine R. Jones, Theodore M. Shaw,* and *Norman J. Chachkin;* for the National Committee for Amish Religious Freedom by *William Bentley Ball* and *Richard E. Connell;* for the National Jewish Commission on Law and Public Affairs by *Nathan Lewin, Mathew S. Nosanchuk,* and *Dennis Rapps;* for the National Trust for Historic Preservation in the United States by *John H. Beisner* and *Elizabeth S. Merritt;* for the Prison Fellowship Ministries et al. by *Michael Joseph Woodruff, Scott J. Ward, J. Matthew Szymanski, Stephen M. Clarke,* and *Isaac M. Jaroslawicz;* and for the United States Catholic Conference et al. by *Michael W. McConnell, Mark E. Chopko,* and *Jeffrey Hunter Moon.*

Briefs of *amici curiae* were filed for the State of Texas by *Dan Morales,* Attorney General, *Jorge Vega,* First Assistant Attorney General, and *Samuel W. Goodhope* and *Javier Aguilar,* Special Assistant Attorneys General; for the Center for the Community Interest by *Gilbert R. Serota;* for Children's Healthcare is a Legal Duty, Inc., et al. by *Robert J. Bruno;* for the Knights of Columbus by *Thomas D. Yannucci* and *Carl A. Anderson;* for the Rutherford Institute by *John W. Whitehead, James A. Hayes, Jr.,* and *Brian L. Day;* and by *Thurston Greene, pro se.*

*JUSTICE SCALIA joins all but Part III–A–1 of this opinion.

style of the region's earlier history. The church seats about 230 worshippers, a number too small for its growing parish. Some 40 to 60 parishioners cannot be accommodated at some Sunday masses. In order to meet the needs of the congregation the Archbishop of San Antonio gave permission to the parish to plan alterations to enlarge the building.

A few months later, the Boerne City Council passed an ordinance authorizing the city's Historic Landmark Commission to prepare a preservation plan with proposed historic landmarks and districts. Under the ordinance, the commission must preapprove construction affecting historic landmarks or buildings in a historic district.

Soon afterwards, the Archbishop applied for a building permit so construction to enlarge the church could proceed. City authorities, relying on the ordinance and the designation of a historic district (which, they argued, included the church), denied the application. The Archbishop brought this suit challenging the permit denial in the United States District Court for the Western District of Texas. 877 F. Supp. 355 (1995).

The complaint contained various claims, but to this point the litigation has centered on RFRA and the question of its constitutionality. The Archbishop relied upon RFRA as one basis for relief from the refusal to issue the permit. The District Court concluded that by enacting RFRA Congress exceeded the scope of its enforcement power under § 5 of the Fourteenth Amendment. The court certified its order for interlocutory appeal and the Fifth Circuit reversed, finding RFRA to be constitutional. 73 F. 3d 1352 (1996). We granted certiorari, 519 U. S. 926 (1996), and now reverse.

II

Congress enacted RFRA in direct response to the Court's decision in *Employment Div., Dept. of Human Resources of Ore.* v. *Smith,* 494 U. S. 872 (1990). There we considered a Free Exercise Clause claim brought by members of the

Native American Church who were denied unemployment benefits when they lost their jobs because they had used peyote. Their practice was to ingest peyote for sacramental purposes, and they challenged an Oregon statute of general applicability which made use of the drug criminal. In evaluating the claim, we declined to apply the balancing test set forth in *Sherbert* v. *Verner,* 374 U. S. 398 (1963), under which we would have asked whether Oregon's prohibition substantially burdened a religious practice and, if it did, whether the burden was justified by a compelling government interest. We stated:

> "[G]overnment's ability to enforce generally applicable prohibitions of socially harmful conduct . . . cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development. To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' . . . contradicts both constitutional tradition and common sense." 494 U. S., at 885 (internal quotation marks and citations omitted).

The application of the *Sherbert* test, the *Smith* decision explained, would have produced an anomaly in the law, a constitutional right to ignore neutral laws of general applicability. The anomaly would have been accentuated, the Court reasoned, by the difficulty of determining whether a particular practice was central to an individual's religion. We explained, moreover, that it "is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." 494 U. S., at 887 (internal quotation marks and citation omitted).

The only instances where a neutral, generally applicable law had failed to pass constitutional muster, the *Smith* Court noted, were cases in which other constitutional protections were at stake. *Id.*, at 881–882. In *Wisconsin* v. *Yoder,* 406 U. S. 205 (1972), for example, we invalidated Wisconsin's mandatory school-attendance law as applied to Amish parents who refused on religious grounds to send their children to school. That case implicated not only the right to the free exercise of religion but also the right of parents to control their children's education.

The *Smith* decision acknowledged the Court had employed the *Sherbert* test in considering free exercise challenges to state unemployment compensation rules on three occasions where the balance had tipped in favor of the individual. See *Sherbert, supra; Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707 (1981); *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U. S. 136 (1987). Those cases, the Court explained, stand for "the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason." 494 U. S., at 884 (internal quotation marks omitted). By contrast, where a general prohibition, such as Oregon's, is at issue, "the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to [free exercise] challenges." *Id.*, at 885. *Smith* held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.

Four Members of the Court disagreed. They argued the law placed a substantial burden on the Native American Church members so that it could be upheld only if the law served a compelling state interest and was narrowly tailored to achieve that end. *Id.*, at 894. JUSTICE O'CONNOR concluded Oregon had satisfied the test, while Justice Blackmun, joined by Justice Brennan and Justice Marshall, could see no compelling interest justifying the law's application to the members.

These points of constitutional interpretation were debated by Members of Congress in hearings and floor debates. Many criticized the Court's reasoning, and this disagreement resulted in the passage of RFRA. Congress announced:

> "(1) [T]he framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
>
> "(2) laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
>
> "(3) governments should not substantially burden religious exercise without compelling justification;
>
> "(4) in Employment Division v. Smith, 494 U. S. 872 (1990), the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
>
> "(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U. S. C. § 2000bb(a).

The Act's stated purposes are:

> "(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U. S. 398 (1963) and Wisconsin v. Yoder, 406 U. S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
>
> "(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government." § 2000bb(b).

RFRA prohibits "[g]overnment" from "substantially burden[ing]" a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." § 2000bb–1. The Act's mandate applies to any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States," as well as to any "State, or . . . subdivision of a State." § 2000bb–2(1). The Act's universal coverage is confirmed in § 2000bb–3(a), under which RFRA "applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [RFRA's enactment]." In accordance with RFRA's usage of the term, we shall use "state law" to include local and municipal ordinances.

III

A

Under our Constitution, the Federal Government is one of enumerated powers. *McCulloch* v. *Maryland,* 4 Wheat. 316, 405 (1819); see also The Federalist No. 45, p. 292 (C. Rossiter ed. 1961) (J. Madison). The judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the "powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury* v. *Madison,* 1 Cranch 137, 176 (1803).

Congress relied on its Fourteenth Amendment enforcement power in enacting the most far-reaching and substantial of RFRA's provisions, those which impose its requirements on the States. See Religious Freedom Restoration Act of 1993, S. Rep. No. 103–111, pp. 13–14 (1993) (Senate Report); H. R. Rep. No. 103–88, p. 9 (1993) (House Report). The Fourteenth Amendment provides, in relevant part:

> "Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due proc-

> ess of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . . .
>
> "Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The parties disagree over whether RFRA is a proper exercise of Congress' § 5 power "to enforce" by "appropriate legislation" the constitutional guarantee that no State shall deprive any person of "life, liberty, or property, without due process of law," nor deny any person "equal protection of the laws."

In defense of the Act, respondent the Archbishop contends, with support from the United States, that RFRA is permissible enforcement legislation. Congress, it is said, is only protecting by legislation one of the liberties guaranteed by the Fourteenth Amendment's Due Process Clause, the free exercise of religion, beyond what is necessary under *Smith*. It is said the congressional decision to dispense with proof of deliberate or overt discrimination and instead concentrate on a law's effects accords with the settled understanding that § 5 includes the power to enact legislation designed to prevent, as well as remedy, constitutional violations. It is further contended that Congress' § 5 power is not limited to remedial or preventive legislation.

All must acknowledge that § 5 is "a positive grant of legislative power" to Congress, *Katzenbach* v. *Morgan*, 384 U. S. 641, 651 (1966). In *Ex parte Virginia*, 100 U. S. 339, 345–346 (1880), we explained the scope of Congress' § 5 power in the following broad terms:

> "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not

> prohibited, is brought within the domain of congressional power."

Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into "legislative spheres of autonomy previously reserved to the States." *Fitzpatrick* v. *Bitzer,* 427 U. S. 445, 455 (1976). For example, the Court upheld a suspension of literacy tests and similar voting requirements under Congress' parallel power to enforce the provisions of the Fifteenth Amendment, see U. S. Const., Amdt. 15, §2, as a measure to combat racial discrimination in voting, *South Carolina* v. *Katzenbach,* 383 U. S. 301, 308 (1966), despite the facial constitutionality of the tests under *Lassiter* v. *Northampton County Bd. of Elections,* 360 U. S. 45 (1959). We have also concluded that other measures protecting voting rights are within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States. *South Carolina* v. *Katzenbach, supra* (upholding several provisions of the Voting Rights Act of 1965); *Katzenbach* v. *Morgan, supra* (upholding ban on literacy tests that prohibited certain people schooled in Puerto Rico from voting); *Oregon* v. *Mitchell,* 400 U. S. 112 (1970) (upholding 5-year nationwide ban on literacy tests and similar voting requirements for registering to vote); *City of Rome* v. *United States,* 446 U. S. 156, 161 (1980) (upholding 7-year extension of the Voting Rights Act's requirement that certain jurisdictions preclear any change to a " 'standard, practice, or procedure with respect to voting' "); see also *James Everard's Breweries* v. *Day,* 265 U. S. 545 (1924) (upholding ban on medical prescription of intoxicating malt liquors as appropriate to enforce Eighteenth Amendment ban on manufacture, sale, or transportation of intoxicating liquors for beverage purposes).

It is also true, however, that "[a]s broad as the congressional enforcement power is, it is not unlimited." *Oregon* v.

Mitchell, supra, at 128 (opinion of Black, J.). In assessing the breadth of § 5's enforcement power, we begin with its text. Congress has been given the power "to enforce" the "provisions of this article." We agree with respondent, of course, that Congress can enact legislation under § 5 enforcing the constitutional right to the free exercise of religion. The "provisions of this article," to which § 5 refers, include the Due Process Clause of the Fourteenth Amendment. Congress' power to enforce the Free Exercise Clause follows from our holding in *Cantwell* v. *Connecticut,* 310 U. S. 296, 303 (1940), that the "fundamental concept of liberty embodied in [the Fourteenth Amendment's Due Process Clause] embraces the liberties guaranteed by the First Amendment." See also *United States* v. *Price,* 383 U. S. 787, 789 (1966) (there is "no doubt of the power of Congress to enforce by appropriate criminal sanction every right guaranteed by the Due Process Clause of the Fourteenth Amendment" (internal quotation marks and citation omitted)).

Congress' power under § 5, however, extends only to "enforc[ing]" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial," *South Carolina* v. *Katzenbach, supra,* at 326. The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."

While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and

Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect. History and our case law support drawing the distinction, one apparent from the text of the Amendment.

1

The Fourteenth Amendment's history confirms the remedial, rather than substantive, nature of the Enforcement Clause. The Joint Committee on Reconstruction of the 39th Congress began drafting what would become the Fourteenth Amendment in January 1866. The objections to the Committee's first draft of the Amendment, and the rejection of the draft, have a direct bearing on the central issue of defining Congress' enforcement power. In February, Republican Representative John Bingham of Ohio reported the following draft Amendment to the House of Representatives on behalf of the Joint Committee:

> "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property." Cong. Globe, 39th Cong., 1st Sess., 1034 (1866).

The proposal encountered immediate opposition, which continued through three days of debate. Members of Congress from across the political spectrum criticized the Amendment, and the criticisms had a common theme: The proposed Amendment gave Congress too much legislative power at the expense of the existing constitutional structure. *E. g., id.,* at 1063–1065 (statement of Rep. Hale); *id.,* at 1082 (statement of Sen. Stewart); *id.*, at 1095 (statement of Rep. Hotchkiss); *id.*, at App. 133–135 (statement of Rep. Rogers). Democrats and conservative Republicans argued that the proposed Amendment would give Congress a power to intrude into traditional areas of state responsibility, a power inconsistent with the federal design central to the Constitution. Typifying these views, Republican Representative Robert Hale of New York labeled the Amendment "an utter departure from every principle ever dreamed of by the men who framed our Constitution," *id.*, at 1063, and warned that under it "all State legislation, in its codes of civil and criminal jurisprudence and procedure . . . may be overridden, may be repealed or abolished, and the law of Congress established instead." *Ibid.* Senator William Stewart of Nevada likewise stated the Amendment would permit "Congress to legislate fully upon all subjects affecting life, liberty, and property," such that "there would not be much left for the State Legislatures," and would thereby "work an entire change in our form of government." *Id.*, at 1082; accord, *id.*, at 1087 (statement of Rep. Davis); *id.*, at App. 133 (statement of Rep. Rogers). Some radicals, like their brethren "unwilling that Congress shall have any such power . . . to establish uniform laws throughout the United States upon . . . the protection of life, liberty, and property," *id.*, at 1095 (statement of Rep. Hotchkiss), also objected that giving Congress primary responsibility for enforcing legal equality would place power in the hands of changing congressional majorities, *ibid.* See generally Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1, 57 (1955); Graham, Our "Declaratory" Fourteenth Amendment, 7 Stan. L. Rev. 3, 21 (1954).

As a result of these objections having been expressed from so many different quarters, the House voted to table the proposal until April. See, *e. g.*, B. Kendrick, Journal of the Joint Committee of Fifteen on Reconstruction 215, 217 (1914); Cong. Globe, 42d Cong., 1st Sess., App. 115 (1871) (statement of Rep. Farnsworth). The congressional action was seen as marking the defeat of the proposal. See The Nation, Mar. 8, 1866, p. 291 ("The postponement of the amendment . . . is conclusive against the passage of [it]"); New York Times, Mar. 1, 1866, p. 4 ("It is doubtful if this ever comes before the House again . . ."); see also Cong. Globe, 42d Cong., 1st Sess., at App. 115 (statement of Rep. Farnsworth) (The Amendment was "given its quietus by a postponement for two months, where it slept the sleep that knows no waking"). The measure was defeated "chiefly because many members of the legal profession s[aw] in [it] . . . a dangerous centralization of power," The Nation, *supra*, at 291, and "many leading Republicans of th[e] House [of Representatives] would not consent to so radical a change in the Constitution," Cong. Globe, 42d Cong., 1st Sess., at App. 151 (statement of Rep. Garfield). The Amendment in its early form was not again considered. Instead, the Joint Committee began drafting a new article of Amendment, which it reported to Congress on April 30, 1866.

Section 1 of the new draft Amendment imposed self-executing limits on the States. Section 5 prescribed that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." See Cong. Globe, 39th Cong., 1st Sess., at 2286. Under the revised Amendment, Congress' power was no longer plenary but remedial. Congress was granted the power to make the substantive constitutional prohibitions against the States effective. Representative Bingham said the new draft would give Congress "the power . . . to protect by national law the privileges and immunities of all the citizens of the Republic . . . whenever the same shall be abridged or denied by the unconstitutional acts of any State." *Id.*, at 2542. Representative Stevens described the new draft Amendment as "allow[ing] Congress to correct the unjust legislation of the States." *Id.*, at 2459. See also *id.*, at 2768 (statement of Sen. Howard) (§5 "enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment"). See generally H. Brannon, The Rights and Privileges Guaranteed by the Fourteenth Amendment to the Constitution of the United States 387 (1901) (Congress' "powers are only prohibitive, corrective, vetoing, aimed only at undue process of law"); *id.*, at 420, 452–455 (same); T. Cooley, Constitutional Limitations 294, n. 1 (2d ed. 1871) ("This amendment of the Constitution does not concentrate power in the general government for any purpose of police government within the States; its object is to preclude legislation by any State which shall 'abridge the privileges or immunities of citizens of the United States' "). The revised Amendment proposal did not raise the concerns expressed earlier regarding broad congressional power to prescribe uniform national laws with respect to life, liberty, and property. See, *e. g.*, Cong. Globe, 42d Cong., 1st Sess., at App. 151 (statement of Rep. Garfield) ("The [Fourteenth Amendment] limited but did not oust the jurisdiction of the State[s]"). After revisions not relevant here, the new measure passed both Houses and was ratified in July 1868 as the Fourteenth Amendment.

The significance of the defeat of the Bingham proposal was apparent even then. During the debates over the Ku Klux Klan Act only a few years after the Amendment's ratification, Representative James Garfield argued there were limits on Congress' enforcement power, saying "unless we ignore both the history and the language of these clauses we cannot, by any reasonable interpretation, give to [§ 5] . . . the force and effect of the rejected [Bingham] clause." *Ibid.;* see also *id.*, at App. 115–116 (statement of Rep. Farnsworth). Scholars of successive generations have agreed with this assessment. See H. Flack, The Adoption of the Fourteenth Amendment 64 (1908); Bickel, The Voting Rights Cases, 1966 S. Ct. Rev. 79, 97.

The design of the Fourteenth Amendment has proved significant also in maintaining the traditional separation of powers between Congress and the Judiciary. The first eight Amendments to the Constitution set forth self-executing prohibitions on governmental action, and this Court has had primary authority to interpret those prohibitions. The Bingham draft, some thought, departed from that tradition by vesting in Congress primary power to interpret and elaborate on the meaning of the new Amendment through legislation. Under it, "Congress, and not the courts, was to judge whether or not any of the privileges or immunities were not secured to citizens in the several States." Flack, *supra*, at 64. While this separation-of-powers aspect did not occasion the widespread resistance which was caused by the proposal's threat to the federal balance, it nonetheless attracted the attention of various Members. See Cong. Globe, 39th Cong., 1st Sess., at 1064 (statement of Rep. Hale) (noting that Bill of Rights, unlike the Bingham proposal, "provide[s] safeguards to be enforced by the courts, and not to be exercised by the Legislature"); *id.*, at App. 133 (statement of Rep. Rogers) (prior to Bingham proposal it "was left entirely for the courts . . . to enforce the privileges and immunities of the citizens"). As enacted, the Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing. Cf. *South Carolina* v. *Katzenbach*, 383 U. S., at 325 (discussing Fifteenth Amendment). The power to interpret the Constitution in a case or controversy remains in the Judiciary.

2

The remedial and preventive nature of Congress' enforcement power, and the limitation inherent in the power, were confirmed in our earliest cases on the Fourteenth Amendment. In the *Civil Rights Cases*, 109 U. S. 3 (1883), the Court invalidated sections of the Civil Rights Act of 1875 which prescribed criminal penalties for denying to any person "the full enjoyment of" public accommodations and conveyances, on the grounds that it exceeded Congress' power by seeking to regulate private conduct. The Enforcement Clause, the Court said, did not authorize Congress to pass "general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing . . . ." *Id.*, at 13–14. The power to "legislate generally upon" life, liberty, and property, as opposed to the "power to provide modes of redress" against offensive state action, was "repugnant" to the Constitution. *Id.*, at 15. See also *United States* v. *Reese*, 92 U. S. 214, 218 (1876); *United States* v. *Harris*, 106 U. S. 629, 639 (1883); *James* v. *Bowman*, 190 U. S. 127, 139 (1903). Although the specific holdings of these early cases might have been superseded or modified, see, *e. g., Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241 (1964); *United States* v. *Guest*, 383 U. S. 745 (1966), their treatment of Congress' § 5 power as corrective or preventive, not definitional, has not been questioned.

Recent cases have continued to revolve around the question whether § 5 legislation can be considered remedial. In *South Carolina* v. *Katzenbach, supra,* we emphasized that "[t]he constitutional propriety of [legislation adopted under the Enforcement Clause] must be judged with reference to the historical experience . . . it reflects." 383 U. S., at 308. There we upheld various provisions of the Voting Rights Act of 1965, finding them to be "remedies aimed at areas where voting discrimination has been most flagrant," *id.*, at 315, and necessary to "banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century," *id.*, at 308. We noted evidence in the record reflecting the subsisting and pervasive discriminatory—and therefore unconstitutional—use of literacy tests. *Id.*, at 333–334. The Act's new remedies, which used the administrative resources of the Federal Government, included the suspension of both literacy tests and, pending federal review, all new voting regulations in covered jurisdictions, as well as the assignment of federal examiners to list qualified applicants enabling those listed to vote. The new, unprecedented remedies were deemed necessary given the ineffectiveness of the existing voting rights laws, see *id.*, at 313–315, and the slow, costly character of case-by-case litigation, *id.*, at 328.

After *South Carolina* v. *Katzenbach,* the Court continued to acknowledge the necessity of using strong remedial and preventive measures to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination. See *Oregon* v. *Mitchell,* 400 U. S., at 132 ("In enacting the literacy test ban . . . Congress had before it a long history of the discriminatory use of literacy tests to disfranchise voters on account of their race") (opinion of Black, J.); *id.*, at 147 (Literacy tests "have been used at times as a discriminatory weapon against some minorities, not only Negroes but Americans of Mexican ancestry, and American Indians") (opinion of Douglas, J.); *id.*, at 216 ("Congress could have determined that racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory application, either conscious or unconscious") (opinion of Harlan, J.); *id.*, at 235 ("[T]here is no question but that Congress could legitimately have concluded that the use of literacy tests anywhere within the United States has the inevitable effect of denying the vote to members of racial minorities whose inability to pass such tests is the direct consequence of previous governmental discrimination in education") (opinion of Brennan, J.); *id.*, at 284 ("[N]ationwide [suspension of literacy tests] may be reasonably thought appropriate when Congress acts against an evil such as racial discrimination which in varying degrees manifests itself in every part of the country") (opinion of Stewart, J.); *City of Rome,* 446 U. S., at 182 ("Congress' considered determination that at least another 7 years of statutory remedies were necessary to counter the perpetuation of 95 years of pervasive voting discrimination is both unsurprising and unassailable"); *Morgan,* 384 U. S., at 656 (Congress had a factual basis to conclude that New York's literacy requirement "constituted an invidious discrimination in violation of the Equal Protection Clause").

3

Any suggestion that Congress has a substantive, nonremedial power under the Fourteenth Amendment is not supported by our case law. In *Oregon* v. *Mitchell, supra,* at 112, a majority of the Court concluded Congress had exceeded its enforcement powers by enacting legislation lowering the minimum age of voters from 21 to 18 in state and local elections. The five Members of the Court who reached this conclusion explained that the legislation intruded into an area reserved by the Constitution to the States. See 400 U. S., at 125 (concluding that the legislation was unconstitutional because the Constitution "reserves to the States the power to set voter qualifications in state and local elections") (opinion of Black, J.); *id.,* at 154 (explaining that the "Fourteenth Amendment was never intended to restrict the authority of the States to allocate their political power as they see fit") (opinion of Harlan, J.); *id.,* at 294 (concluding that States, not Congress, have the power "to establish a qualification for voting based on age") (opinion of Stewart, J., joined by Burger, C. J., and Blackmun, J.). Four of these five were explicit in rejecting the position that § 5 endowed Congress with the power to establish the meaning of constitutional provisions. See *id.,* at 209 (opinion of Harlan, J.); *id.,* at 296 (opinion of Stewart, J.). Justice Black's rejection of this position might be inferred from his disagreement with Congress' interpretation of the Equal Protection Clause. See *id.,* at 125.

There is language in our opinion in *Katzenbach* v. *Morgan,* 384 U. S. 641 (1966), which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment. This is not a necessary interpretation, however, or even the best one. In *Morgan*, the Court considered the constitutionality of § 4(e) of the Voting Rights Act of 1965, which provided that no person who had successfully completed the sixth primary grade in a public school in, or a private school accredited by, the Commonwealth of Puerto Rico in which the language of instruction was other than English could be denied the right to vote because of an inability to read or write English. New York's Constitution, on the other hand, required voters to be able to read and write English. The Court provided two related rationales for its conclusion that § 4(e) could "be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government." *Id.*, at 652. Under the first rationale, Congress could prohibit New York from denying the right to vote to large segments of its Puerto Rican community, in order to give Puerto Ricans "enhanced political power" that would be "helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community." *Ibid.* Section 4(e) thus could be justified as a remedial measure to deal with "discrimination in governmental services." *Id.*, at 653. The second rationale, an alternative holding, did not address discrimination in the provision of public services but "discrimination in establishing voter qualifications." *Id.*, at 654. The Court perceived a factual basis on which Congress could have concluded that New York's literacy requirement "constituted an invidious discrimination in violation of the Equal Protection Clause." *Id.*, at 656. Both rationales for upholding § 4(e) rested on unconstitutional discrimination by New York and Congress' reasonable attempt to combat it. As Justice Stewart explained in *Oregon* v. *Mitchell, supra,* at 296, interpreting *Morgan* to give Congress the power to interpret the Constitution "would require an enormous extension of that decision's rationale."

If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it." *Marbury* v. *Madison*, 1 Cranch, at 177. Under this approach, it is difficult to conceive of a principle that would limit congressional power. See Van Alstyne, The Failure of the Religious Freedom Restoration Act under Section 5 of the Fourteenth Amendment, 46 Duke L. J. 291, 292–303 (1996). Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.

We now turn to consider whether RFRA can be considered enforcement legislation under § 5 of the Fourteenth Amendment.

B

Respondent contends that RFRA is a proper exercise of Congress' remedial or preventive power. The Act, it is said, is a reasonable means of protecting the free exercise of religion as defined by *Smith*. It prevents and remedies laws which are enacted with the unconstitutional object of targeting religious beliefs and practices. See *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 533 (1993) ("[A] law targeting religious beliefs as such is never permissible"). To avoid the difficulty of proving such violations, it is said, Congress can simply invalidate any law which imposes a substantial burden on a religious practice unless it is justified by a compelling interest and is the least restrictive means of accomplishing that interest. If Congress can prohibit laws with discriminatory effects in order to prevent racial discrimination in violation of the Equal Protection Clause, see *Fullilove* v. *Klutznick*, 448 U. S. 448, 477 (1980) (plurality opinion); *City of Rome*, 446 U. S., at 177, then it can do the same, respondent argues, to promote religious liberty.

While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented. See *South Carolina* v. *Katzenbach,* 383 U. S., at 308. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one. *Id.*, at 334.

A comparison between RFRA and the Voting Rights Act is instructive. In contrast to the record which confronted Congress and the Judiciary in the voting rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years. See, *e. g.*, Religious Freedom Restoration Act of 1991, Hearings on H. R. 2797 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 102d Cong., 2d Sess., 331–334 (1993) (statement of Douglas Laycock) (House Hearings); The Religious Freedom Restoration Act, Hearing on S. 2969 before the Senate Committee on the Judiciary, 102d Cong., 2d Sess., 30–31 (1993) (statement of Dallin H. Oaks) (Senate Hearing); *id.*, at 68–76 (statement of Douglas Laycock); Religious Freedom Restoration Act of 1990, Hearing on H. R. 5377 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 101st Cong., 2d Sess., 49 (1991) (statement of John H. Buchanan, Jr.) (1990 House Hearing). The absence of more recent episodes stems from the fact that, as one witness testified, "deliberate persecution is not the usual problem in this country." House Hearings 334 (statement of Douglas Laycock). See also House Report 2 ("[L]aws directly targeting religious practices have become increasingly rare"). Rather, the emphasis of the hearings was on laws of general applicability which place incidental burdens on religion. Much of the discussion centered upon anecdotal evidence of autopsies performed on Jewish individuals and Hmong immigrants in violation of their religious beliefs, see, *e. g.*, House Hearings 81 (statement of Nadine Strossen); *id.*, at 107–110 (statement of William Yang); *id.*, at 118 (statement of Rep. Stephen J. Solarz); *id.*, at 336 (statement of Douglas Laycock); Senate Hearing 5–6, 14–26 (statement of William Yang); *id.*, at 27–28 (statement of Hmong-Lao Unity Assn., Inc.); *id.*, at 50 (statement of Baptist Joint Committee); see also Senate Report 8; House Report 5–6, and n. 14, and on zoning regulations and historic preservation laws (like the one at issue here), which, as an incident of their normal operation, have adverse effects on churches and synagogues. See, *e. g.*, House Hearings 17, 57 (statement of Robert P. Dugan, Jr.); *id.*, at 81 (statement of Nadine Strossen); *id.*, at 122–123 (statement of Rep. Stephen J. Solarz); *id.*, at 157 (statement of Edward M. Gaffney, Jr.); *id.*, at 327 (statement of Douglas Laycock); Senate Hearing 143–144 (statement of Forest D. Montgomery); 1990 House Hearing 39 (statement of Robert P. Dugan, Jr.); see also Senate Report 8; House Report 5–6, and n. 14. It is difficult to maintain that they are examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices or that they indicate some widespread pattern of religious discrimination in this country. Congress' concern was with the incidental burdens imposed, not the object or purpose of the legislation. See House Report 2; Senate Report 4–5; House Hearings 64 (statement of Nadine Strossen); *id.*, at 117–118 (statement of Rep. Stephen J. Solarz); 1990 House Hearing 14 (statement of Rep. Stephen J. Solarz). This lack of support in the legislative record, however, is not RFRA's most serious shortcoming. Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but "on due regard for the decision of the body constitutionally appointed to decide." *Oregon* v. *Mitchell*, 400 U. S., at 207 (opinion of Harlan, J.). As a general matter, it is for Congress to determine the method by which it will reach a decision.

Regardless of the state of the legislative record, RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections. Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional. See *City of Rome*, 446 U. S., at 177 (since "jurisdictions with a demonstrable history of intentional racial discrimination . . . create the risk of purposeful discrimination," Congress could "prohibit changes that have a discriminatory impact" in those jurisdictions). Remedial legislation under § 5 "should be adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against." *Civil Rights Cases*, 109 U. S., at 13.

RFRA is not so confined. Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. RFRA's restrictions apply to every agency and official of the Federal, State, and local Governments. 42 U. S. C. § 2000bb–2(1). RFRA applies to all federal and state law, statutory or otherwise, whether adopted before or after its enactment. § 2000bb–3(a). RFRA has no termination date or termination mechanism. Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.

The reach and scope of RFRA distinguish it from other measures passed under Congress' enforcement power, even in the area of voting rights. In *South Carolina* v. *Katzenbach*, the challenged provisions were confined to those regions of the country where voting discrimination had been most flagrant, see 383 U. S., at 315, and affected a discrete class of state laws, *i. e.*, state voting laws. Furthermore, to ensure that the reach of the Voting Rights Act was limited to those cases in which constitutional violations were most likely (in order to reduce the possibility of overbreadth), the coverage under the Act would terminate "at the behest of States and political subdivisions in which the danger of substantial voting discrimination has not materialized during the preceding five years." *Id.*, at 331. The provisions restricting and banning literacy tests, upheld in *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966), and *Oregon* v. *Mitchell, supra,* attacked a particular type of voting qualification, one with a long history as a "notorious means to deny and abridge voting rights on racial grounds." *South Carolina* v. *Katzenbach,* 383 U. S., at 355 (Black, J., concurring and dissenting). In *City of Rome, supra,* the Court rejected a challenge to the constitutionality of a Voting Rights Act provision which required certain jurisdictions to submit changes in electoral practices to the Department of Justice for preimplementation review. The requirement was placed only on jurisdictions with a history of intentional racial discrimination in voting. *Id.*, at 177. Like the provisions at issue in *South Carolina* v. *Katzenbach,* this provision permitted a covered jurisdiction to avoid preclearance requirements under certain conditions and, moreover, lapsed in seven years. This is not to say, of course, that § 5 legislation requires termination dates, geographic restrictions, or egregious predicates. Where, however, a congressional enactment pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5.

The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved. If an objector can show a substantial burden on his free exercise, the

State must demonstrate a compelling governmental interest and show that the law is the least restrictive means of furthering its interest. Claims that a law substantially burdens someone's exercise of religion will often be difficult to contest. See *Smith*, 494 U. S., at 887 ("What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith?"); *id.*, at 907 ("The distinction between questions of centrality and questions of sincerity and burden is admittedly fine . . .") (O'CONNOR, J., concurring in judgment). Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. If " 'compelling interest' really means what it says . . . , many laws will not meet the test. . . . [The test] would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." *Id.*, at 888. Laws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise. We make these observations not to reargue the position of the majority in *Smith* but to illustrate the substantive alteration of its holding attempted by RFRA. Even assuming RFRA would be interpreted in effect to mandate some lesser test, say, one equivalent to intermediate scrutiny, the statute nevertheless would require searching judicial scrutiny of state law with the attendant likelihood of invalidation. This is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens.

The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*. Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion. In most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry. If a state law disproportionately burdened a particular class of religious observers, this circumstance might be evidence of an impermissible legislative motive. Cf. *Washington* v. *Davis,* 426 U. S. 229, 241 (1976). RFRA's substantial-burden test, however, is not even a discriminatory-effects or disparate-impact test. It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs. In addition, the Act imposes in every case a least restrictive means requirement—a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify—which also indicates that the legislation is broader than is appropriate if the goal is to prevent and remedy constitutional violations.

When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution. This has been clear from the early days of the Republic. In 1789, when a Member of the House of Representatives objected to a debate on the constitutionality of legislation based on the theory that "it would be officious" to consider the constitutionality of a measure that did not affect the House, James Madison explained that "it is incontrovertibly of as much importance to this branch of the Government as to any other, that the constitution should be preserved entire. It is our duty." 1 Annals of Congress 500 (1789). Were it otherwise, we would not afford Congress the presumption of validity its enactments now enjoy.

Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. *Marbury* v. *Madison,* 1 Cranch, at 177. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis,* and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.

* * *

It is for Congress in the first instance to "determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," and its conclusions are entitled to much deference. *Katzenbach* v. *Morgan,* 384 U. S., at 651. Congress' discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury* v. *Madison,* to determine if Congress has exceeded its authority under the Constitution. Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance. The judgment of the Court of Appeals sustaining the Act's constitutionality is reversed.

It is so ordered.

Justice Stevens, concurring.

In my opinion, the Religious Freedom Restoration Act of 1993 (RFRA) is a "law respecting an establishment of religion" that violates the First Amendment to the Constitution.

If the historic landmark on the hill in Boerne happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances that forbid an enlargement of the structure. Because the landmark is owned by the Catholic Church, it is claimed that RFRA gives its owner a federal statutory entitlement to an exemption from a generally applicable, neutral civil law. Whether the Church would actually prevail under the statute or not, the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment. *Wallace* v. *Jaffree*, 472 U. S. 38, 52–55 (1985).

JUSTICE SCALIA, with whom JUSTICE STEVENS joins, concurring in part.

I write to respond briefly to the claim of JUSTICE O'CONNOR's dissent (hereinafter the dissent) that historical materials support a result contrary to the one reached in *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990). See *post*, p. 544 (dissenting opinion). We held in *Smith* that the Constitution's Free Exercise Clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" 494 U. S., at 879 (quoting *United States* v. *Lee*, 455 U. S. 252, 263, n. 3 (1982) (STEVENS, J., concurring in judgment)). The material that the dissent claims is at odds with *Smith* either has little to say about the issue or is in fact more consistent with *Smith* than with the dissent's interpretation of the Free Exercise Clause. The dissent's extravagant claim that the historical record shows *Smith* to have been wrong should be compared with the assessment of the most prominent scholarly critic of *Smith*, who, after an extensive review of the historical record, was willing to venture no more than that "constitutionally compelled exemptions [from generally applicable laws regulating conduct] were *within the contemplation* of the framers and ratifiers as a *possible interpretation* of the free exercise clause." McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1415 (1990) (emphasis added); see also Hamburger, A Constitutional Right of Religious Exemption: An Historical Perspective, 60 Geo. Wash. Law Rev. 915 (1992) (arguing that historical evidence supports *Smith*'s interpretation of free exercise).

The dissent first claims that *Smith*'s interpretation of the Free Exercise Clause departs from the understanding reflected in various statutory and constitutional protections of religion enacted by Colonies, States, and Territories in the period leading up to the ratification of the Bill of Rights. *Post,* at 550–557. But the protections afforded by those enactments are in fact more consistent with *Smith*'s interpretation of free exercise than with the dissent's understanding of it. The Free Exercise Clause, the dissent claims, "is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference, even when such conduct conflicts with a neutral, generally applicable law"; thus, even neutral laws of general application may be invalid if they burden religiously motivated conduct. *Post,* at 546. However, the early "free exercise" enactments cited by the dissent protect only against action that is taken "for" or "in respect of" religion, *post,* at 551–553 (Maryland Act Concerning Religion of 1649, Rhode Island Charter of 1663, and New Hampshire Constitution); or action taken "on account of" religion, *post,* at 553–554 (Maryland Declaration of Rights of 1776 and Northwest Ordinance of 1787); or "discriminat[ory]" action, *post,* at 553 (New York Constitution); or, finally (and unhelpfully for purposes of interpreting "free exercise" in the Federal Constitution), action that interferes with the "free exercise" of religion, *post,* at 551, 554 (Maryland Act

Concerning Religion of 1649 and Georgia Constitution). It is eminently arguable that application of neutral, generally applicable laws of the sort the dissent refers to—such as zoning laws, *post,* at 547—would not constitute action taken "for," "in respect of," or "on account of" one's religion, or "discriminatory" action.

Assuming, however, that the affirmative protection of religion accorded by the early "free exercise" enactments sweeps as broadly as the dissent's theory would require, those enactments do not support the dissent's view, since they contain "provisos" that significantly qualify the affirmative protection they grant. According to the dissent, the "provisos" support *its* view because they would have been "superfluous" if "the Court was correct in *Smith* that generally applicable laws are enforceable regardless of religious conscience." *Post,* at 554–555. I disagree. In fact, the most plausible reading of the "free exercise" enactments (if their affirmative provisions are read broadly, as the dissent's view requires) is a virtual restatement of *Smith:* Religious exercise shall be permitted *so long as it does not violate general laws governing conduct.* The "provisos" in the enactments negate a license to act in a manner "unfaithfull to the Lord Proprietary" (Maryland Act Concerning Religion of 1649), or "behav[e]" in other than a "peaceabl[e] and quie[t]" manner (Rhode Island Charter of 1663), or "disturb the public peace" (New Hampshire Constitution), or interfere with the "peace [and] safety of th[e] State" (New York, Maryland, and Georgia Constitutions), or "demea[n]" oneself in other than a "peaceable and orderly manner" (Northwest Ordinance of 1787). See *post,* at 551–554. At the time these provisos were enacted, keeping "peace" and "order" seems to have meant, precisely, obeying the laws. "[E]very breach of a law is against the peace." *Queen* v. *Lane,* 6 Mod. 128, 87 Eng. Rep. 884, 885 (Q. B. 1704). Even as late as 1828, when Noah Webster published his American Dictionary of the English Language, he gave as one of the meanings of "peace": "8. Public tranquility; that quiet, order and security which is guaranteed by the laws; as, to keep the *peace;* to break the *peace.*" 2 An American Dictionary of the English Language 31 (1828).[1] This limitation upon the scope of religious exercise would have been in accord with the background political philosophy of the age (associated most prominently with John Locke), which regarded freedom as the right "to do only what was not lawfully prohibited," West, The Case Against a Right to Religion-Based Exemptions, 4 Notre Dame J. L., Ethics & Pub. Pol'y 591, 624 (1990). "Thus, the disturb-the-peace caveats apparently permitted government to deny religious freedom, not merely in the event of violence or force, but, more generally, upon the occurrence of illegal actions." Hamburger, *supra,* at 918–919.[2] And while, under this interpretation, these early "free exercise" enactments support the Court's judgment in *Smith,* I see no sensible interpretation that could cause them to support what I understand to be the position of JUSTICE O'CONNOR, or any of *Smith*'s other critics. No one in that camp, to my knowledge, contends that their favored "compelling state interest" test conforms to any possible interpretation of "breach of peace and order"—*i. e.,* that *only* violence or force, or any other category of action (more limited than "violation of law") which can possibly be conveyed by the phrase "peace and order," justifies state prohibition of religiously motivated conduct.

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[1] The word "licentious," used in several of the early enactments, likewise meant "[e]xceeding the limits of law." 2 An American Dictionary of the English Language 6 (1828).

[2] The same explanation applies, of course, to George Mason's initial draft of Virginia's religious liberty clause, see *post,* at 555. When it said "unless, under colour of religion, any man disturb the peace . . . of society," it probably meant "unless under color of religion any man break the law." Thus, it is not the case that "*both* Mason's and [James] Madison's formulations envisioned that, when there was a conflict [between religious exercise and generally applicable laws], a person's interest in freely practicing his religion was to be balanced against state interests," *post,* at 556—at least insofar as regulation of *conduct* was concerned.

Apart from the early "free exercise" enactments of Colonies, States, and Territories, the dissent calls attention to those bodies', and the Continental Congress's, legislative accommodation of religious practices prior to ratification of the Bill of Rights. *Post*, at 557–560. This accommodation—which took place both before and after enactment of the state constitutional protections of religious liberty—suggests (according to the dissent) that "the drafters and ratifiers of the First Amendment . . . assumed courts would apply the Free Exercise Clause similarly." *Post*, at 560. But that legislatures sometimes (though not always)[3] found it "appropriate," *post*, at 559, to accommodate religious practices does not establish that accommodation was understood to be constitutionally *mandated* by the Free Exercise Clause. As we explained in *Smith*, "to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required." 494 U. S., at 890. "Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process." *Ibid.*

The dissent's final source of claimed historical support consists of statements of certain of the Framers in the context of debates about proposed legislative enactments or debates over general principles (not in connection with the drafting of State or Federal Constitutions). Those statements are subject to the same objection as was the evidence about legislative accommodation: There is no reason to think they were meant to describe what was constitutionally required (and judicially enforceable), as opposed to what was thought to be legislatively or even morally desirable. Thus, for example, the pamphlet written by James Madison opposing Virginia's proposed general assessment for support of religion, *post,* at 560–561, does not argue that the assessment would violate the "free exercise" provision in the Virginia Declaration of Rights, although that provision had been enacted into law only eight years earlier, *post,* at 556; rather the pamphlet argues that the assessment wrongly placed civil society ahead of personal religious belief and, thus, should not be approved by the legislators, *post,* at 560–561. Likewise, the letter from George Washington to the Quakers, *post,* at 562, by its own terms refers to Washington's "wish and desire" that religion be accommodated, not his belief that existing constitutional provisions required accommodation. These and other examples offered by the dissent reflect the speakers' views of the "proper" relationship between government and religion, *post,* at 563, but not their views (at least insofar as the content or context of the material suggests) of the constitutionally required relationship. The one exception is the statement by Thomas Jefferson that he considered "the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises," *post,* at 562 (internal quotation marks omitted); but it is quite clear that Jefferson did not in fact espouse the broad principle of affirmative accommodation advocated by the dissent, see McConnell, 103 Harv. L. Rev., at 1449–1452.

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[3] The dissent mentions, for example, that only 7 of the 13 Colonies had exempted Quakers from military service by the mid-1700's; and that "*virtually* all" of the States had enacted oath exemptions by 1789. *Post*, at 558 (emphasis added).

It seems to me that the most telling point made by the dissent is to be found, not in what it says, but in what it fails to say. Had the understanding in the period surrounding the ratification of the Bill of Rights been that the various forms of accommodation discussed by the dissent were constitutionally required (either by State Constitutions or by the Federal Constitution), it would be surprising not to find a single state or federal case refusing to enforce a generally applicable statute because of its failure to make accommodation. Yet the dissent cites none—and to my knowledge, and to the knowledge of the academic defenders of the dissent's position, see, *e. g., id.,* at 1504, 1506–1511 (discussing early cases), none exists. The closest one can come in the period prior to 1850 is the decision of a New York City municipal court in 1813, holding that the New York Constitution of 1777, quoted *post,* at 553, required acknowledgment of a priest-penitent privilege, to protect a Catholic priest from being compelled to testify as to the contents of a confession. *People* v. *Phillips,* Court of General Sessions, City of New York (June 14, 1813), excerpted in Privileged Communications to Clergymen, 1 Cath. Law. 199 (1955). Even this lone case is weak authority, not only because it comes from a minor court,[4] but also because it did not involve a statute, and the same result might possibly have been achieved (without invoking constitutional entitlement) by the court's simply modifying the common-law rules of evidence to recognize such a privilege. On the other side of the ledger, moreover, there are two cases, from the Supreme Court of Pennsylvania, flatly rejecting the dissent's view. In *Simon's Executors* v. *Gratz,* 2 Pen. & W. 412 (Pa. 1831), the court held that a litigant was not entitled to a continuance of trial on the ground that appearing on his Sabbath would violate his religious principles. And in *Stansbury* v. *Marks,* 2 Dall. 213 (Pa. 1793), decided just two years after the ratification of the Bill of Rights, the court imposed a fine on a witness who "refused to be sworn, because it was his Sabbath."[5]

I have limited this response to the new items of "historical evidence" brought forward by today's dissent. (The dissent's claim that "[b]efore *Smith,* our free exercise cases were generally in keeping" with the dissent's view, *post,* at 546, is adequately answered in *Smith* itself.) The historical evidence marshalled by the dissent cannot fairly be said to demonstrate the correctness of *Smith;* but it is more supportive of that conclusion than destructive of it. And, to return to a point I made earlier, that evidence is not compatible with any theory I am familiar with that has been proposed as an alternative to *Smith.* The dissent's approach has, of course, great popular attraction. Who can possibly be against the abstract proposition that government should not, even in its general, nondiscriminatory laws, place unreasonable burdens upon religious practice? Unfortunately, however, that abstract proposition must ultimately be reduced to concrete cases. The issue presented by *Smith* is, quite simply, whether the people, through their elected representatives, or rather this Court, shall control the outcome of those concrete cases. For example, shall it be the determination of this Court, or rather of the people, whether (as the dissent apparently believes, *post,* at 547) church construction will be exempt from zoning laws? The historical evidence put forward by the dissent does nothing to undermine the conclusion we reached in *Smith:* It shall be the people.

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[4] The Court of General Sessions was a mayor's court, and the ruling in *Phillips* was made by DeWitt Clinton, the last mayor to preside over that court, which was subsequently reconstituted as the Court of Common Pleas. Clinton had never been a jurist, and indeed had never practiced law. Some years before *Phillips,* he was instrumental in removing the political disabilities of Catholics in New York. See 4 Dictionary of American Biography 221–222, 224 (1943).

[5] Indeed, the author of *Simon's Executors* could well have written *Smith:* "[C]onsiderations of policy address themselves with propriety to the legislature, and not to a magistrate whose course is prescribed not by discretion, but rules already established." 2 Pen. & W., at 417.

JUSTICE O'CONNOR, with whom JUSTICE BREYER joins except as to the first paragraph of Part I, dissenting.

I dissent from the Court's disposition of this case. I agree with the Court that the issue before us is whether the Religious Freedom Restoration Act of 1993 (RFRA) is a proper exercise of Congress' power to enforce § 5 of the Fourteenth Amendment. But as a yardstick for measuring the constitutionality of RFRA, the Court uses its holding in *Employment Div., Dept. of Human Resources of Ore.* v. *Smith,* 494 U. S. 872 (1990), the decision that prompted Congress to enact RFRA as a means of more rigorously enforcing the Free Exercise Clause. I remain of the view that *Smith* was wrongly decided, and I would use this case to reexamine the Court's holding there. Therefore, I would direct the parties to brief the question whether *Smith* represents the correct understanding of the Free Exercise Clause and set the case for reargument. If the Court were to correct the misinterpretation of the Free Exercise Clause set forth in *Smith,* it would simultaneously put our First Amendment jurisprudence back on course and allay the legitimate concerns of a majority in Congress who believed that *Smith* improperly restricted religious liberty. We would then be in a position to review RFRA in light of a proper interpretation of the Free Exercise Clause.

I

I agree with much of the reasoning set forth in Part III–A of the Court's opinion. Indeed, if I agreed with the Court's standard in *Smith,* I would join the opinion. As the Court's careful and thorough historical analysis shows, Congress lacks the "power to decree the *substance* of the Fourteenth Amendment's restrictions on the States." *Ante,* at 519 (emphasis added). Rather, its power under § 5 of the Fourteenth Amendment extends only to *enforcing* the Amendment's provisions. In short, Congress lacks the ability independently to define or expand the scope of constitutional rights by statute. Accordingly, whether Congress has exceeded its § 5 powers turns on whether there is a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Ante,* at 520. This recognition does not, of course, in any way diminish Congress' obligation to draw its own conclusions regarding the Constitution's meaning. Congress, no less than this Court, is called upon to consider the requirements of the Constitution and to act in accordance with its dictates. But when it enacts legislation in furtherance of its delegated powers, Congress must make its judgments consistent with this Court's exposition of the Constitution and with the limits placed on its legislative authority by provisions such as the Fourteenth Amendment.

The Court's analysis of whether RFRA is a constitutional exercise of Congress' § 5 power, set forth in Part III–B of its opinion, is premised on the assumption that *Smith* correctly interprets the Free Exercise Clause. This is an assumption that I do not accept. I continue to believe that *Smith* adopted an improper standard for deciding free exercise claims. In *Smith,* five Members of this Court—without briefing or argument on the issue—interpreted the Free Exercise Clause to permit the government to prohibit, without justification, conduct mandated by an individual's religious beliefs, so long as the prohibition is generally applicable. Contrary to the Court's holding in that case, however, the Free Exercise Clause is not simply an antidiscrimination principle that protects only against those laws that single out religious practice for unfavorable treatment. See *Smith, supra,* at 892–903 (O'CONNOR, J., concurring in judgment). Rather, the Clause is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference, even when such conduct conflicts with a neutral, generally applicable law. Before *Smith,* our free exercise cases were generally in keeping with this idea: where a law substantially burdened religiously motivated conduct—regardless whether it was specifically targeted at religion or applied generally—we required government to justify that law with a compelling state interest and to use means narrowly tailored to achieve that interest. See 494 U. S., at 894 (citing *Hernandez* v. *Commissioner,* 490 U. S. 680, 699 (1989); *Hobbie* v. *Unemployment Appeals Comm'n of Fla.,* 480 U. S. 136, 141 (1987); *United States* v. *Lee,* 455 U. S. 252, 257–258 (1982); *McDaniel* v. *Paty,* 435 U. S. 618, 626–629 (1978); *Wisconsin* v. *Yoder,* 406 U. S. 205, 215 (1972); *Gillette* v. *United States,* 401 U. S. 437, 462 (1971); *Sherbert* v. *Verner,* 374 U. S. 398, 403 (1963)).

The Court's rejection of this principle in *Smith* is supported neither by precedent nor, as discussed below, by history. The decision has harmed religious liberty. For example, a Federal District Court, in reliance on *Smith*, ruled that the Free Exercise Clause was not implicated where Hmong natives objected on religious grounds to their son's autopsy, conducted pursuant to a generally applicable state law. *Yang* v. *Sturner*, 750 F. Supp. 558, 559 (RI 1990). The Court of Appeals for the Eighth Circuit held that application of a city's zoning laws to prevent a church from conducting services in an area zoned for commercial uses raised no free exercise concerns, even though the city permitted secular not-for-profit organizations in that area. *Cornerstone Bible Church* v. *Hastings*, 948 F. 2d 464 (1991); see also *Rector of St. Bartholomew's Church* v. *New York*, 914 F. 2d 348, 355 (CA2 1990) (no free exercise claim where city's application of facially neutral landmark designation law "drastically restricted the Church's ability to raise revenue to carry out its various charitable and ministerial programs"), cert. denied, 499 U. S. 905 (1991); *State* v. *Hershberger*, 462 N. W. 2d 393 (Minn. 1990) (Free Exercise Clause provided no basis for exempting an Amish farmer from displaying a bright orange triangle on his buggy, to which the farmer objected on religious grounds, even though the evidence showed that some other material would have served the State's purpose equally well). These cases demonstrate that lower courts applying *Smith* no longer find necessary a searching judicial inquiry into the possibility of reasonably accommodating religious practice.

Stare decisis concerns should not prevent us from revisiting our holding in *Smith*. "'*[S]tare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.'" *Adarand Constructors, Inc.* v. *Peña*, 515 U. S.

200, 231 (1995) (quoting *Helvering* v. *Hallock,* 309 U. S. 106, 119 (1940)). This principle is particularly true in constitutional cases, where—as this case so plainly illustrates—"correction through legislative action is practically impossible." *Seminole Tribe of Fla.* v. *Florida,* 517 U. S. 44, 63 (1996) (internal quotation marks and citation omitted). I believe that, in light of both our precedent and our Nation's tradition of religious liberty, *Smith* is demonstrably wrong. Moreover, it is a recent decision. As such, it has not engendered the kind of reliance on its continued application that would militate against overruling it. Cf. *Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U. S. 833, 855–856 (1992).

Accordingly, I believe that we should reexamine our holding in *Smith,* and do so in this very case. In its place, I would return to a rule that requires government to justify any substantial burden on religiously motivated conduct by a compelling state interest and to impose that burden only by means narrowly tailored to achieve that interest.

II

I shall not restate what has been said in other opinions, which have demonstrated that *Smith* is gravely at odds with our earlier free exercise precedents. See *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah,* 508 U. S. 520, 570–571 (1993) (SOUTER, J., concurring in part and concurring in judgment) (stating that it is "difficult to escape the conclusion that, whatever *Smith*'s virtues, they do not include a comfortable fit with settled law"); *Smith,* 494 U. S., at 894–901 (O'CONNOR, J., concurring in judgment); see also McConnell, Free Exercise Revisionism and the *Smith* Decision, 57 U. Chi. L. Rev. 1109, 1120–1127 (1990). Rather, I examine here the early American tradition of religious free exercise to gain insight into the original understanding of the Free Exercise Clause—an inquiry the Court in *Smith* did not undertake. We have previously recognized the importance of interpreting the Religion Clauses in light of their history. *Lynch* v. *Donnelly,* 465 U. S. 668, 673 (1984) ("The Court's interpretation of the Establishment Clause has comported with what history reveals was the contemporaneous understanding of its guarantees"); *School Dist. of Abington Township* v. *Schempp,* 374 U. S. 203, 212–214 (1963).

The historical evidence casts doubt on the Court's current interpretation of the Free Exercise Clause. The record instead reveals that its drafters and ratifiers more likely viewed the Free Exercise Clause as a guarantee that government may not unnecessarily hinder believers from freely practicing their religion, a position consistent with our pre-*Smith* jurisprudence.

A

The original Constitution, drafted in 1787 and ratified by the States in 1788, had no provisions safeguarding individual liberties, such as freedom of speech or religion. Federalists, the chief supporters of the new Constitution, took the view that amending the Constitution to explicitly protect individual freedoms was superfluous, since the rights that the amendments would protect were already completely secure. See, *e. g.,* 1 Annals of Congress 440, 443–444, 448–459 (Gales and Seaton ed. 1834) (remarks of James Madison, June 8, 1789). Moreover, they feared that guaranteeing certain civil liberties might backfire, since the express mention of some freedoms might imply that others were not protected. According to Alexander Hamilton, a Bill of Rights would even be dangerous, in that by specifying "various exceptions to powers" not granted, it "would afford a colorable pretext to claim more than were granted." The Federalist No. 84, p. 513 (C. Rossiter ed. 1961). Anti-Federalists, however, insisted on more definite guarantees. Apprehensive that the newly established Federal Government would overwhelm the rights of States and individuals, they wanted explicit assurances that the Federal Government had no power in matters of personal liberty. T. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment 194 (1986). Additionally, Baptists and other Protestant dissenters feared for their religious liberty under the new Federal Government and called for an amendment guaranteeing religious freedom. *Id.*, at 198.

In the end, legislators acceded to these demands. By December 1791, the Bill of Rights had been added to the Constitution. With respect to religious liberty, the First Amendment provided: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U. S. Const., Amdt. 1. Neither the First Congress nor the ratifying state legislatures debated the question of religious freedom in much detail, nor did they directly consider the scope of the First Amendment's free exercise protection. It would be disingenuous to say that the Framers neglected to define precisely the scope of the Free Exercise Clause because the words "free exercise" had a precise meaning. L. Levy, Essays on American Constitutional History 173 (1972). As is the case for a number of the terms used in the Bill of Rights, it is not exactly clear what the Framers thought the phrase signified. *Ibid.* ("[I]t is astonishing to discover that the debate on a Bill of Rights was conducted on a level of abstraction so vague as to convey the impression that Americans of 1787–1788 had only the most nebulous conception of the meanings of the particular rights they sought to insure"). But a variety of sources supplement the legislative history and shed light on the original understanding of the Free Exercise Clause. These materials suggest that—contrary to *Smith*—the Framers did not intend simply to prevent the government from adopting laws that discriminated against religion. Although the Framers may not have asked precisely the questions about religious liberty that we do today, the historical record indicates that they believed that the Constitution affirmatively protects religious free exercise and that it limits the government's ability to intrude on religious practice.

B

The principle of religious "free exercise" and the notion that religious liberty deserved legal protection were by no means new concepts in 1791, when the Bill of Rights was ratified. To the contrary, these principles were first articulated in this country in the Colonies of Maryland, Rhode Island, Pennsylvania, Delaware, and Carolina, in the mid-1600's. These Colonies, though established as sanctuaries for particular groups of religious dissenters, extended freedom of religion to groups—although often limited to Christian groups—beyond their own. Thus, they encountered early on the conflicts that may arise in a society made up of a plurality of faiths.

The term "free exercise" appeared in an American legal document as early as 1648, when Lord Baltimore extracted from the new Protestant Governor of Maryland and his councilors a promise not to disturb Christians, particularly Roman Catholics, in the "free exercise" of their religion. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1425 (1990) (hereinafter Origins of Free Exercise). Soon after, in 1649, the Maryland Assembly enacted the first free exercise clause by passing the Act Concerning Religion: "[N]oe person . . . professing to beleive in Jesus Christ, shall from henceforth bee any waies troubled, Molested or discountenanced for or in respect of his or her religion nor in the free exercise thereof . . . nor any way [be] compelled to the beleife or exercise of any other Religion against his or her consent, soe as they be not unfaithfull to the Lord Proprietary, or molest or conspire against the civill Governemt." Act Concerning Religion of 1649, reprinted in 5 The Founders' Constitution 49, 50 (P. Kurland & R. Lerner eds. 1987) (hereinafter Founders' Constitution). Rhode Island's Charter of 1663 used the analogous term "liberty of conscience." It protected residents from being in any ways "molested, punished, disquieted, or called in question, for any differences in opinione, in matters of religion, and doe not actually disturb the civil peace of our sayd colony." The Charter further provided that residents may "freely, and fully have and enjoy his and their own judgments, and conscience in matters of religious concernments . . . ; they behaving themselves peaceably and quietly and not using this liberty to licentiousness and profaneness; nor to the civil injury, or outward disturbance of others." Charter of Rhode Island and Providence Plantations, 1663, in 8 W. Swindler, Sources and Documents of United States Constitutions 363 (1979) (hereinafter Swindler). Various agreements between prospective settlers and the proprietors of Carolina, New York, and New Jersey similarly guaranteed religious freedom, using language that paralleled that of the Rhode Island Charter of 1663. See New York Act Declaring Rights & Priviledges (1691); Concession and Agreement of the Lords Proprietors of the Province of New Caesarea, or New-Jersey (1664); Laws of West New-Jersey, Art. X (1681); Fundamental Constitutions for East New-Jersey, Art. XVI (1683); First Charter of Carolina, Art. XVIII (1663). N. Cogan, The Complete Bill of Rights 23–27 (Galley 1997).

These documents suggest that, early in our country's history, several Colonies acknowledged that freedom to pursue one's chosen religious beliefs was an essential liberty. Moreover, these Colonies appeared to recognize that government should interfere in religious matters only when necessary to protect the civil peace or to prevent "licentiousness." In other words, when religious beliefs conflicted with civil law, religion prevailed unless important state interests militated otherwise. Such notions parallel the ideas expressed in our pre-*Smith* cases—that government may not hinder believers from freely exercising their religion, unless necessary to further a significant state interest.

C

The principles expounded in these early charters reemerged over a century later in state constitutions that were adopted in the flurry of constitution drafting that followed the American Revolution. By 1789, every State but Connecticut had incorporated some version of a free exercise clause into its constitution. Origins of Free Exercise 1455. These state provisions, which were typically longer and more detailed than the Federal Free Exercise Clause, are perhaps the best evidence of the original understanding of the Constitution's protection of religious liberty. After all, it is reasonable to think that the States that ratified the First Amendment assumed that the meaning of the federal free exercise provision corresponded to that of their existing state clauses. The precise language of these state precursors to the Free Exercise Clause varied, but most guaranteed free exercise of religion or liberty of conscience, limited by particular, defined state interests. For example, the New York Constitution of 1777 provided:

> "[T]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided,* That the liberty of conscience, hereby granted, *shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.*" N. Y. Const., Art. XXXVIII, in 7 Swindler 178 (emphasis added).

Similarly, the New Hampshire Constitution of 1784 declared:

> "Every individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping GOD, in the manner and season most agreeable to the dictates of his own conscience, . . . *provided he doth not disturb the public peace, or disturb others,* in their religious worship." N. H. Const., Art. I, § 5, in 6 Swindler 345 (emphasis added).

The Maryland Declaration of Rights of 1776 read:

> "[N]o person ought by any law to be molested in his person or estate on account of his religious persuasion

> or profession, or for his religious practice; unless, under colour of religion, *any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others,* in their natural, civil, or religious rights." Md. Const., Declaration of Rights, Art. XXXIII in 4 Swindler 374 (emphasis added).

The religious liberty clause of the Georgia Constitution of 1777 stated:

> "All persons whatever shall have the free exercise of their religion; provided *it be not repugnant to the peace and safety of the State.*" Ga. Const., Art. LVI, in 2 Swindler 449 (emphasis added).

In addition to these state provisions, the Northwest Ordinance of 1787—which was enacted contemporaneously with the drafting of the Constitution and reenacted by the First Congress—established a bill of rights for a territory that included what is now Ohio, Indiana, Michigan, Wisconsin, and part of Minnesota. Article I of the Ordinance declared:

> "No person, *demeaning himself in a peaceable and orderly manner,* shall ever be molested on account of his mode of worship or religious sentiments, in the said territory." Northwest Territory Ordinance of 1787, Art. I, 1 Stat. 52 (emphasis added).

The language used in these state constitutional provisions and the Northwest Ordinance strongly suggests that, around the time of the drafting of the Bill of Rights, it was generally accepted that the right to "free exercise" required, where possible, accommodation of religious practice. If not—and if the Court was correct in *Smith* that generally applicable laws are enforceable regardless of religious conscience—there would have been no need for these documents to specify, as the New York Constitution did, that rights of conscience should not be "construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of [the] State." Such a proviso would have been superfluous. Instead, these documents make sense only if the right to free exercise was viewed as generally superior to ordinary legislation, to be overridden only when necessary to secure important government purposes.

The Virginia Legislature may have debated the issue most fully. In May 1776, the Virginia Constitutional Convention wrote a constitution containing a Declaration of Rights with a clause on religious liberty. The initial drafter of the clause, George Mason, proposed the following:

> "That religion, or the duty which we owe to our CREATOR, and the manner of discharging it, can be (directed) only by reason and conviction, not by force or violence; and therefore, *that all men should enjoy the fullest toleration in the exercise of religion,* according to the dictates of conscience, unpunished and unrestrained by the magistrate, *unless, under colour of religion, any man disturb the peace, the happiness, or safety of society.* And that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other." Committee Draft of the Virginia Declaration of Rights, 1 Papers of George Mason 284–285 (R. Rutland ed. 1970) (emphasis added).

Mason's proposal did not go far enough for a 26-year-old James Madison, who had recently completed his studies at the Presbyterian College of Princeton. He objected first to Mason's use of the term "toleration," contending that the word implied that the right to practice one's religion was a governmental favor, rather than an inalienable liberty. Second, Madison thought Mason's proposal countenanced too much state interference in religious matters, since the "exercise of religion" would have yielded whenever it was deemed inimical to "the peace, happiness, or safety of society." Madison suggested the provision read instead:

> "'That religion, or the duty we owe our Creator, and the manner of discharging it, being under the direction

> of reason and conviction only, not of violence or compulsion, *all men are equally entitled to the full and free exercise of it, according to the dictates of conscience;* and therefore that no man or class of men ought on account of religion to be invested with peculiar emoluments or privileges, nor subjected to any penalties or disabilities, *unless under color of religion the preservation of equal liberty, and the existence of the State be manifestly endangered.'*" G. Hunt, James Madison and Religious Liberty, in 1 Annual Report of the American Historical Association, H. R. Doc. No. 702, 57th Cong., 1st Sess., 163, 166–167 (1901) (emphasis added).

Thus, Madison wished to shift Mason's language of "toleration" to the language of rights. See S. Cobb, The Rise of Religious Liberty in America 492 (1902) (reprint 1970) (noting that Madison objected to the word "toleration" as belonging to "a system where was an established Church, and where a certain liberty of worship was granted, not of right, but of grace"). Additionally, under Madison's proposal, the State could interfere in a believer's religious exercise only if the State would otherwise "be manifestly endangered." In the end, neither Mason's nor Madison's language regarding the extent to which state interests could limit religious exercise made it into the Virginia Constitution's religious liberty clause. Like the Federal Free Exercise Clause, the Virginia religious liberty clause was simply silent on the subject, providing only that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience." Virginia Declaration of Rights, Art. XVI (1776), in 10 Swindler 50. For our purposes, however, it is telling that *both* Mason's and Madison's formulations envisioned that, when there was a conflict, a person's interest in freely practicing his religion was to be balanced against state interests. Although Madison endorsed a more limited state interest exception than did Mason, the debate would have been irrelevant if either had thought the right to free exercise did not include a right to be exempt from certain generally applicable laws. Presumably, the Virginia Legislature intended the scope of its free exercise provision to strike some middle ground between Mason's narrower and Madison's broader notions of the right to religious freedom.

D

The practice of the Colonies and early States bears out the conclusion that, at the time the Bill of Rights was ratified, it was accepted that government should, when possible, accommodate religious practice. Unsurprisingly, of course, even in the American Colonies inhabited by people of religious persuasions, religious conscience and civil law rarely conflicted. Most 17th and 18th century Americans belonged to denominations of Protestant Christianity whose religious practices were generally harmonious with colonial law. Curry, The First Freedoms, at 219 ("The vast majority of Americans assumed that theirs was a Christian, i. e. Protestant, country, and they automatically expected that government would uphold the commonly agreed on Protestant ethos and morality"). Moreover, governments then were far smaller and less intrusive than they are today, which made conflict between civil law and religion unusual.

Nevertheless, tension between religious conscience and generally applicable laws, though rare, was not unknown in preconstitutional America. Most commonly, such conflicts arose from oath requirements, military conscription, and religious assessments. Origins of Free Exercise 1466. The ways in which these conflicts were resolved suggest that Americans in the Colonies and early States thought that, if an individual's religious scruples prevented him from complying with a generally applicable law, the government should, if possible, excuse the person from the law's coverage. For example, Quakers and certain other Protestant sects refused on Biblical grounds to subscribe to oaths or "swear" allegiance to civil authority. A. Adams & C. Emmerich, A Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religion Clauses 14 (1990) (hereinafter Adams & Emmerich). Without accommodation, their beliefs would have prevented them from participating in civic activities involving oaths, including testifying in court. Colonial governments created alternatives to the oath requirement for these individuals. In early decisions, for example, the Carolina proprietors applied the religious liberty provision of the Carolina Charter of 1665 to permit Quakers to enter pledges in a book. Curry, The First Freedoms, at 56. Similarly, in 1691, New York enacted a law allowing Quakers to testify by affirmation, and in 1734, it permitted Quakers to qualify to vote by affirmation. *Id.*, at 64. By 1789, virtually all of the States had enacted oath exemptions. See Adams & Emmerich 62.

Early conflicts between religious beliefs and generally applicable laws also occurred because of military conscription requirements. Quakers and Mennonites, as well as a few smaller denominations, refused on religious grounds to carry arms. Members of these denominations asserted that liberty of conscience should exempt them from military conscription. Obviously, excusing such objectors from military service had a high public cost, given the importance of the military to the defense of society. Nevertheless, Rhode Island, North Carolina, and Maryland exempted Quakers from military service in the late 1600's. New York, Massachusetts, Virginia, and New Hampshire followed suit in the mid-1700's. Origins of Free Exercise 1468. The Continental Congress likewise granted exemption from conscription:

> "As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consist-

> ently with their religious principles." Resolution of July 18, 1775, reprinted in 2 Journals of the Continental Congress, 1774–1789, pp. 187, 189 (W. Ford ed. 1905).

Again, this practice of excusing religious pacifists from military service demonstrates that, long before the First Amendment was ratified, legislative accommodations were a common response to conflicts between religious practice and civil obligation. Notably, the Continental Congress exempted objectors from conscription to avoid "violence to their consciences," explicitly recognizing that civil laws must sometimes give way to freedom of conscience. Origins of Free Exercise 1468.

States and Colonies with established churches encountered a further religious accommodation problem. Typically, these governments required citizens to pay tithes to support either the government-established church or the church to which the tithepayer belonged. But Baptists and Quakers, as well as others, opposed all government-compelled tithes on religious grounds. *Id.*, at 1469. Massachusetts, Connecticut, New Hampshire, and Virginia responded by exempting such objectors from religious assessments. *Ibid.* There are additional examples of early conflicts between civil laws and religious practice that were similarly settled through accommodation of religious exercise. Both North Carolina and Maryland excused Quakers from the requirement of removing their hats in court; Rhode Island exempted Jews from the requirements of the state marriage laws; and Georgia allowed groups of European immigrants to organize whole towns according to their own faith. *Id.*, at 1471.

To be sure, legislatures, not courts, granted these early accommodations. But these were the days before there *was* a Constitution to protect civil liberties—judicial review did not yet exist. These legislatures apparently believed that the appropriate response to conflicts between civil law and religious scruples was, where possible, accommodation of religious conduct. It is reasonable to presume that the drafters and ratifiers of the First Amendment—many of whom served in state legislatures—assumed courts would apply the Free Exercise Clause similarly, so that religious liberty was safeguarded.

E

The writings of the early leaders who helped to shape our Nation provide a final source of insight into the original understanding of the Free Exercise Clause. The thoughts of James Madison—one of the principal architects of the Bill of Rights—as revealed by the controversy surrounding Virginia's General Assessment Bill of 1784, are particularly illuminating. Virginia's debate over religious issues did not end with its adoption of a constitutional free exercise provision. Although Virginia had disestablished the Church of England in 1776, it left open the question whether religion might be supported on a nonpreferential basis by a so-called "general assessment." Levy, Essays on American Constitutional History, at 200. In the years between 1776 and 1784, the issue how to support religion in Virginia—either by general assessment or voluntarily—was widely debated. Curry, The First Freedoms, at 136.

By 1784, supporters of a general assessment, led by Patrick Henry, had gained a slight majority in the Virginia Assembly. M. Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment 23 (1978); Levy, *supra*, at 200. They introduced "A Bill Establishing a Provision for the Teachers of the Christian Religion," which proposed that citizens be taxed in order to support the Christian denomination of their choice, with those taxes not designated for any specific denomination to go to a public fund to aid seminaries. Levy, *supra*, at 200–201; Curry, *supra*, at 140–141; Malbin, *supra*, at 23. Madison viewed religious assessment as a dangerous infringement of religious liberty and led the opposition to the bill. He took the case against religious assessment to the people of Virginia in his now-famous "Memorial and Remonstrance Against Religious Assessments." Levy, *supra*, at 201. This pamphlet led thousands of Virginians to oppose the bill and to submit petitions expressing their views to the legislature. Malbin, *supra*, at 24. The bill eventually died in committee, and Virginia instead enacted a Bill for Establishing Religious Freedom, which Thomas Jefferson had drafted in 1779. Malbin, *supra*, at 24.

The "Memorial and Remonstrance" begins with the recognition that "[t]he Religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." 2 Writings of James Madison 184 (G. Hunt ed. 1901). By its very nature, Madison wrote, the right to free exercise is "unalienable," both because a person's opinion "cannot follow the dictates of other[s]," and because it entails "a duty towards the Creator." *Ibid.* Madison continued:

> "This duty [owed the Creator] is precedent both in order of time and degree of obligation, to the claims of Civil Society. . . . [E]very man who becomes a member of any particular Civil Society, [must] do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance." *Id.*, at 184–185.

To Madison, then, duties to God were superior to duties to civil authorities—the ultimate loyalty was owed to God above all. Madison did not say that duties to the Creator are precedent only to those laws specifically directed at religion, nor did he strive simply to prevent deliberate acts of persecution or discrimination. The idea that civil obligations are subordinate to religious duty is consonant with the notion that government must accommodate, where possible, those religious practices that conflict with civil law.

Other early leaders expressed similar views regarding religious liberty. Thomas Jefferson, the drafter of Virginia's Bill for Establishing Religious Freedom, wrote in that document that civil government could interfere in religious exercise only "when principles break out into overt acts against peace and good order." In 1808, he indicated that he considered "'the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises.'" 11 The Writings of Thomas Jefferson 428–429 (A. Lipscomb ed. 1904) (quoted in Office of Legal Policy, U. S. Dept. of Justice, Report to the Attorney General, Religious Liberty under the Free Exercise Clause 7 (1986)). Moreover, Jefferson believed that "'[e]very religious society has a right to determine for itself the time of these exercises, and the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the Constitution has deposited it.'" *Ibid.*

George Washington expressly stated that he believed that government should do its utmost to accommodate religious scruples, writing in a letter to a group of Quakers:

> "[I]n my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit." Letter from George Washington to the Religious Society Called Quakers (Oct. 1789), in George Washington on Religious Liberty and Mutual Understanding 11 (E. Humphrey ed. 1932).

Oliver Ellsworth, a Framer of the First Amendment and later Chief Justice of the United States, expressed the similar view that government could interfere in religious matters only when necessary "to prohibit and punish gross immoralities and impieties; because the open practice of these is of evil example and detriment." Oliver Ellsworth, Landholder, No. 7 (Dec. 17, 1787), reprinted in 4 Founders' Constitution 640. Isaac Backus, a Baptist minister who was a delegate to the Massachusetts ratifying convention of 1788, declared that " 'every person has an unalienable right to act in all religious affairs according to the full persuasion of his own mind, where others are not injured thereby.' " Backus, A Declaration of Rights, of the Inhabitants of the State of Massachusetts-Bay, in Isaac Backus on Church, State, and Calvinism 487 (W. McLoughlin ed. 1968).

These are but a few examples of various perspectives regarding the proper relationship between church and government that existed during the time the First Amendment was drafted and ratified. Obviously, since these thinkers approached the issue of religious freedom somewhat differently, see Adams & Emmerich 21–31, it is not possible to distill their thoughts into one tidy formula. Nevertheless, a few general principles may be discerned. Foremost, these early leaders accorded religious exercise a special constitutional status. The right to free exercise was a substantive guarantee of individual liberty, no less important than the right to free speech or the right to just compensation for the taking of property. See P. Kauper, Religion and the Constitution 17 (1964) ("[O]ur whole constitutional history . . . supports the conclusion that religious liberty is an independent liberty, that its recognition may either require or permit preferential treatment on religious grounds in some instances . . . "). As Madison put it in the concluding argument of his "Memorial and Remonstrance":

> " '[T]he equal right of every citizen to the free exercise of his Religion according to the dictates of [his] conscience' is held by the same tenure with all our other rights. . . . [I]t is equally the gift of nature; . . . it cannot be less dear to us; . . . it is enumerated with equal solem-

> nity, or rather studied emphasis." 2 Writings of James Madison, at 190.

Second, all agreed that government interference in religious practice was not to be lightly countenanced. Adams & Emmerich 31. Finally, all shared the conviction that "'true religion and good morals are the only solid foundation of public liberty and happiness.'" Curry, The First Freedoms, at 219 (quoting Continental Congress); see Adams & Emmerich 72 ("The Founders . . . acknowledged that the republic rested largely on moral principles derived from religion"). To give meaning to these ideas—particularly in a society characterized by religious pluralism and pervasive regulation—there will be times when the Constitution requires government to accommodate the needs of those citizens whose religious practices conflict with generally applicable law.

III

The Religion Clauses of the Constitution represent a profound commitment to religious liberty. Our Nation's Founders conceived of a Republic receptive to voluntary religious expression, not of a secular society in which religious expression is tolerated only when it does not conflict with a generally applicable law. As the historical sources discussed above show, the Free Exercise Clause is properly understood as an affirmative guarantee of the right to participate in religious activities without impermissible governmental interference, even where a believer's conduct is in tension with a law of general application. Certainly, it is in no way anomalous to accord heightened protection to a right identified in the text of the First Amendment. For example, it has long been the Court's position that freedom of speech—a right enumerated only a few words after the right to free exercise—has special constitutional status. Given the centrality of freedom of speech and religion to the American concept of personal liberty, it is altogether reasonable to conclude that both should be treated with the highest degree of respect.

Although it may provide a bright line, the rule the Court declared in *Smith* does not faithfully serve the purpose of the Constitution. Accordingly, I believe that it is essential for the Court to reconsider its holding in *Smith*—and to do so in this very case. I would therefore direct the parties to brief this issue and set the case for reargument.

I respectfully dissent from the Court's disposition of this case.

JUSTICE SOUTER, dissenting.

To decide whether the Fourteenth Amendment gives Congress sufficient power to enact the Religious Freedom Restoration Act of 1993, the Court measures the legislation against the free-exercise standard of *Employment Div., Dept. of Human Resources of Ore.* v. *Smith,* 494 U. S. 872 (1990). For the reasons stated in my opinion in *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah,* 508 U. S. 520, 564–577 (1993) (opinion concurring in part and concurring in judgment), I have serious doubts about the precedential value of the *Smith* rule and its entitlement to adherence. These doubts are intensified today by the historical arguments going to the original understanding of the Free Exercise Clause presented in JUSTICE O'CONNOR's dissent, *ante,* at 548–564, which raises very substantial issues about the soundness of the *Smith* rule. See also *ante,* p. 537 (JUSTICE SCALIA, concurring in part) (addressing historical arguments). But without briefing and argument on the merits of that rule (which this Court has never had in any case, including *Smith* itself, see *Lukumi,* 508 U. S., at 571–572), I am not now prepared to join JUSTICE O'CONNOR in rejecting it or the majority in assuming it to be correct. In order to provide full adversarial consideration, this case should be set down for reargument permitting plenary reexamination of the issue. Since the Court declines to follow that course, our free-exercise law remains marked by an "intolerable tension," *id.*, at 574, and the constitutionality of the Act of Congress to enforce the free-exercise right cannot now be soundly decided. I would therefore dismiss the writ of certiorari as improvidently granted, and I accordingly dissent from the Court's disposition of this case.

JUSTICE BREYER, dissenting.

I agree with JUSTICE O'CONNOR that the Court should direct the parties to brief the question whether *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), was correctly decided, and set this case for reargument. I do not, however, find it necessary to consider the question whether, assuming *Smith* is correct, § 5 of the Fourteenth Amendment would authorize Congress to enact the legislation before us. Thus, while I agree with some of the views expressed in the first paragraph of Part I of JUSTICE O'CONNOR's dissent, I do not necessarily agree with all of them. I therefore join JUSTICE O'CONNOR's dissent, with the exception of the first paragraph of Part I.

LAWYER *v.* DEPARTMENT OF JUSTICE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

No. 95–2024. Argued February 19, 1997—Decided June 25, 1997

Based on the 1990 census, the Florida Legislature adopted a reapportionment plan for State Senate and House districts. When the Justice Department refused to preclear the plan, the State Supreme Court entered an order encouraging the state legislature to adopt a new plan. Advised that the Governor would not convene an extraordinary session and that neither the Senate President nor the House Speaker would convene his respective House, the court concluded that legislative impasse had occurred and revised the redistricting plan itself producing Plan 330. In 1995, appellant and other residents of Senate District 21 as revised in Plan 330 filed suit against state and federal parties in the Federal District Court, alleging that District 21 violated the Equal Protection Clause. The three-judge court permitted intervention by the State Senate, the House of Representatives, and others. Ultimately, all the parties but appellant agreed to a settlement that would revise District 21 under a new plan, Plan 386. At a hearing, the District Court rejected appellant's objections that the court was obliged to find Plan 330 unconstitutional before approving the settlement, and that Plan 386 was unconstitutional under *Miller* v. *Johnson,* 515 U. S. 900, because only race could explain District 21's contours. The court approved the settlement.

Held:

1. The District Court did not err in approving the settlement agreement without formally holding Plan 330 unconstitutional. Pp. 575–580.

(a) State redistricting responsibility should be accorded primacy to the extent possible when a federal court exercises remedial power. *Growe* v. *Emison,* 507 U. S. 25, 34. A State should be given the opportunity to make its own redistricting decision so long as that is practically possible and the State chooses to take the opportunity. *Ibid.; Wise* v. *Lipscomb,* 437 U. S. 535, 540. The District Court's decision did not deny the State's legislature and Supreme Court the opportunity to devise a new redistricting plan here, for the State has selected its opportunity by entering into the settlement agreement. There is no reason to suppose that the State's attorney general lacked authority to propose a plan as an incident of his authority to represent the State in the litigation, and the participation of counsel for each legislative chamber confirms this authority as well as the legislature's continuing refusal to address the issue in formal session. The State has taken advantage of the opportunity recognized in *Growe* and *Wise*. Pp. 575–578.

(b) The District Court was not bound to adjudicate liability before settlement even though appellant refused to settle. The settlement agreement did not impermissibly impose duties or obligations on appellant or dispose of his claims. See *Firefighters* v. *Cleveland*, 478 U. S. 501, 529. It disposed of his claim not in the forbidden sense of cutting him off from a remedy to which he was entitled, but only in the legitimate sense of granting him an element of the very relief he had sought: the elimination of the plan he claimed was unconstitutional. Insofar as appellant also wanted the new plan to be constitutional, he is in the same position he would have been with a formal decree: his views on Plan 386's merits were heard, and his right to attack it in this appeal is unimpaired. He may not demand the adjudication that the State could have demanded but instead waived. Pp. 578–580.

2. The District Court's finding that Plan 386 did not subordinate traditional districting principles to race is not clearly erroneous. See *Miller* v. *Johnson*, *supra*, at 915–917. Appellant's contrary claim is based on his charges that District 21 encompasses more than one county, crosses a body of water, is irregular in shape, lacks compactness, and contains a percentage of black voters significantly higher than the overall percentage in the counties from which the district is drawn. His first four points ignore unrefuted evidence showing that District 21 is no different from what Florida's traditional districting principles could have been expected to produce. As to the final point, this Court has never suggested that the percentage of black residents in a district may not exceed the percentage of black residents in any of the counties from which a district is created, and has never required similar racial composition of different political districts to avoid an inference of racial gerrymandering in any one of them. Pp. 580–582.

920 F. Supp. 1248, affirmed.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which O'CONNOR, KENNEDY, and THOMAS, JJ., joined, *post*, p. 583.

Robert J. Shapiro argued the cause for appellant. With him on the briefs was *C. Martin Lawyer III, pro se.*

Richard G. Taranto argued the cause for the state appellees. With him on the brief were *Peter Antonacci*, Deputy

Attorney General of Florida, *George L. Waas,* Assistant Attorney General, *Donald L. Bell, Stephen N. Zack, B. Elaine New,* and *Ben H. Hill III. Irving L. Gornstein* argued the cause for the United States. With him on the brief were *Acting Solicitor General Dellinger, Assistant Attorney General Patrick, Deputy Solicitor General Waxman, Mark L. Gross,* and *Rebecca K. Troth. Robert B. McDuff, James M. Landis, Barbara R. Arnwine, Thomas J. Henderson, Brenda Wright,* and *Todd A. Cox* filed a brief for appellees Senator James T. Hargrett, Jr., et al.*

JUSTICE SOUTER delivered the opinion of the Court.

Appellant was one of several plaintiffs in this suit challenging the configuration of a Florida legislative district under the Equal Protection Clause. All parties except appellant reached a provisional settlement agreement and, after a fairness hearing, a three-judge District Court approved the remedial districting plan proposed in the agreement. Appellant claims that the District Court acted without giving the State an adequate opportunity to make its own redistricting choice by approving the remedial plan without first adjudicating the legality of the original plan, that the court had no authority to approve any settlement over his objection, and that the remedial plan violates the Constitution. We hold that the State exercised the choice to which it was entitled under our cases, that appellant has no right to block the settlement, and that he has failed to point up any unconstitutionality in the plan proposed.

I

After the 1990 Decennial Census, the Florida Legislature adopted a reapportionment plan for Florida's 40 Senate districts and 120 House districts. Following the procedure for

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**Robinson O. Everett* filed a brief for Americans for the Defense of Constitutional Rights, Inc., as *amicus curiae.*

reapportionment set forth in the State Constitution, see Fla. Const., Art. III, § 16(c) (1970), the attorney general of Florida petitioned the State Supreme Court for a declaration that the plan comported with state and federal law. That court approved the redistricting plan, while noting that time constraints imposed by the State Constitution precluded a full review of objections raised to the plan under § 2 of the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U. S. C. § 1973. The court retained jurisdiction to entertain further objections to the plan. See *In re Constitutionality of Senate Joint Resolution 2G,* 597 So. 2d 276, 285–286 (Fla.), amended, 601 So. 2d 543 (Fla. 1992); *Johnson* v. *De Grandy,* 512 U. S. 997, 1001 (1994).

Since five Florida counties, including Hillsborough County where the city of Tampa is located, are covered jurisdictions under § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U. S. C. § 1973c, see 28 CFR pt. 51, App. (1996); see also *Johnson, supra,* at 1001, n. 2, the state attorney general submitted the redistricting plan to the United States Department of Justice for preclearance. On June 16, 1992, the Department declined to preclear the proposed State Senate districts, on the grounds that the redistricting plan divided "politically cohesive minority populations" in the Hillsborough County area and failed to create a majority-minority district in that region. Letter from Assistant United States Attorney General John Dunne to Florida Attorney General Robert A. Butterworth (quoted in *In re Constitutionality of Senate Joint Resolution 2G, supra,* at 547 (Shaw, C. J., specially concurring)); see also *De Grandy* v. *Wetherell,* 815 F. Supp. 1550, 1556 (ND Fla. 1992), aff'd in part and rev'd in part, *Johnson* v. *De Grandy, supra.*

The Supreme Court of Florida then entered an order encouraging the state legislature to adopt a new plan to address the Justice Department's objection, and noting that if the legislature failed to act, the court itself would adopt a reapportionment plan. See 815 F. Supp., at 1556; see also

601 So. 2d, at 544–545. The state court was advised that the Governor had no intent to convene the legislature in extraordinary session and that neither the President of the Senate nor the Speaker of the House of Representatives would convene his respective House. *Ibid.;* see also 815 F. Supp., at 1556. The court concluded that a legislative impasse had occurred and, invoking authority under state law, revised the Senate redistricting plan to address the Justice Department's objection. 601 So. 2d, at 545.

The amended plan, known as Plan 330, called for an irregularly shaped Senate District 21, with a voting-age population 45.8% black and 9.4% Hispanic and comprising portions of four counties in the Tampa Bay area. *Id.*, at 546. The district included the central portions of Tampa in Hillsborough County, the eastern shore of Tampa Bay running south to Bradenton in Manatee County, central portions of St. Petersburg in Pinellas County, a narrow projection eastward through parts of Hillsborough and Polk Counties, and a narrow finger running north from St. Petersburg to Clearwater. See Juris. Statement 29a. Although the State Supreme Court acknowledged that the district was "more contorted" than other possible plans and that black residents in different parts of the district might have little in common besides their race, it decided that such concerns "must give way to racial and ethnic fairness." See 601 So. 2d, at 546. Elections were held under Plan 330 in 1992 and 1994.[1]

On April 14, 1994, appellant and five other residents of Hillsborough County filed this suit in the District Court invoking jurisdiction under 28 U. S. C. §§ 1331, 1343, and 2201, *et seq.*, naming the State of Florida, its attorney general, and the United States Department of Justice as defendants, and alleging that District 21 in Plan 330 violated the Equal Protection Clause. The plaintiffs sought declaratory and injunctive relief, including an order requiring Florida to reconfigure the district. See App. 14. A three-judge District Court was convened and ultimately permitted intervention by the State Senate, House of Representatives, Secretary of State, District 21 Senator James T. Hargrett, Jr., and a group of black and Hispanic voters residing in District 21. Record 33, 78; 159 Tr. 25, 30 (Sept. 27, 1995).

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[1] In separate litigation, we rejected § 2 vote dilution claims attacking certain Senate districts in the Miami and Pensacola areas created by the legislature's redistricting plan (as modified by the State Supreme Court through Plan 330). See *Johnson* v. *De Grandy*, 512 U. S. 997 (1994).

At a status conference held on July 6, 1995, shortly after we decided *Miller* v. *Johnson*, 515 U. S. 900 (1995), all parties agreed to the appointment of a mediator to seek resolution of the suit,[2] see Record 78, at 2; 134 Tr. 13, 14, 16 (July 6, 1995), though pretrial proceedings continued during the ensuing mediation. After the mediator declared an impasse in late October, see 166 Tr. 8 (Oct. 26, 1995), the parties continued discussions on their own and on November 2, 1995, filed with the District Court a settlement agreement signed on behalf of all parties except appellant. App. 17–21. The agreement noted that while the defendants and defendant-intervenors denied the plaintiffs' claims that District 21 was unconstitutional, all parties to the settlement concurred that "there is a reasonable factual and legal basis for the plaintiffs' claim." *Id.*, at 17. The agreement proposed revising District 21 under a new plan, called Plan 386, which would be subject to public comment and, if approved by the District Court after a public hearing, would be used in state elections unless Florida adopted a new plan. *Id.*, at 18–19. District

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[2] At the time, the District Court had permitted the Florida Senate to intervene, see Record 33, but had yet to rule on motions to intervene from Senator Hargrett and from the group of minority voters in District 21. The District Court indicated that it intended to grant all pending motions to intervene, and treated prospective intervenors as parties. 134 Tr. 4 (July 6, 1995). The House of Representatives had yet to file a motion to intervene, but was represented at the status conference and indicated its intention to file a motion to intervene. *Id.*, at 24. No one at the status conference objected to submitting the matter to mediation. The Secretary of State was not represented at the conference.

21, as revised in Plan 386, would no longer extend into Polk County or north toward Clearwater, would have a boundary length decreased by 58%, and would include a resident black voting-age population reduced from 45.0% to 36.2%. *Id.*, at 25, 40. The proposed district would cover portions of three counties instead of four and continue to include land on both sides of Tampa Bay. Record 169, attachment 4.

At a status conference held the same day the parties filed the settlement agreement, the District Court sought and received specific assurances from lawyers for the President of the Senate and the Speaker of the House that they were authorized to represent their respective government bodies in the litigation and enter into the settlement proposed. 180 Tr. 23–24 (Nov. 2, 1995). Appellant argued that the District Court was required to hold Plan 330 unconstitutional before it could adopt a new districting plan, see *id.*, at 16, but the District Court disagreed, noting that "there is simply not a litigable issue with respect to what we have for shorthand purposes referred to as liability and we ought simply then to proceed . . . to resolve the issue of the fairness of this proposed settlement and entertain any objections [concerning it]." *Id.*, at 26.

The District Court scheduled a hearing on the proposed plan for November 20, giving notice in 13 area newspapers and making details of the plan available for review in the clerk's office. See App. 161. Before the hearing, the settling parties submitted evidence including affidavits and declarations addressing the factors considered in revising District 21, Record 188, and appellant submitted his own remedial plan for a District 21 wholly contained within Hillsborough County, Record 172, at A4. At the hearing, counsel for the State Senate summarized the prehearing filings submitted by proponents of the settlement and the rationale behind the agreement. App. 160–172. The District Court denied appellant's motion for ruling on his motion for summary judgment on the legality of Plan 330, saying that "[i]t makes no difference whether we grant the motion or not. . . . [I]f we granted your motion, we would be in this precise posture we are in now." *Id.*, at 173. Appellant then argued that District 21, as redrawn in Plan 386, would still be unconstitutional because only race could explain its contours, see *id.*, at 175–188, and counsel for a former state legislator spoke to the same effect, *id.*, at 188–190.

On March 19, 1996, the District Court approved the settlement. See 920 F. Supp. 1248, 1257 (MD Fla. 1996). The panel majority first held that it was not obliged to find the existing District 21 unconstitutional in order to approve the settlement. While recognizing the need to "guard against any disingenuous adventures" by litigants, *id.*, at 1252, n. 2, the majority noted that a State should not be deprived of the opportunity to avoid "an expensive and protracted contest and the possibility of an adverse and disruptive adjudication" by a rule insisting on "a public *mea culpa*" as the sole condition for dispensing with "a dispositive, specific determination of the controlling constitutional issue." *Id.*, at 1252, and n. 2. To balance the competing interests, the court required a showing of a substantial "evidentiary and legal" basis for the plaintiffs' claim before the settlement would be approved, *id.*, at 1252, and it held the standard satisfied. "Each party either states unequivocally that existing District 21 is unconstitutionally configured or concedes, for purposes of settlement, that the plaintiffs have established *prima facie* unconstitutionality." *Id.*, at 1253, n. 3. The majority found that the "boundaries of current District 21 are markedly uneven and, in some respects, extraordinary," *id.*, at 1253, and that the district "bears at least some of the conspicuous signs of a racially conscious contrivance," *id.*, at 1255.

The District Court then turned to the merits of Plan 386 to determine whether its formation had been "dominated by the single-minded focus" on race that it understood to be constitutionally forbidden under *Miller*. 920 F. Supp., at

1254. The court observed that the November 20 hearing "produced but two dissenters, plaintiff Lawyer and a former state Senator, both of whom neither presented relevant evidence nor offered germane legal argument." *Id.*, at 1255. The District Court concluded that a "constitutional objection to the proposed District 21 is not established. In its shape and composition, proposed District 21 is, all said and done, demonstrably benign and satisfactorily tidy, especially given the prevailing geography." *Ibid.* The court noted that the new district's percentage of minority residents would approximate the racial features of the region surrounding Tampa Bay better than Plan 330 did, that the district's boundaries would be "less strained and irregular" than those in Plan 330, and that all candidates, regardless of race, would have an opportunity to seek office, with "both a fair chance to win and the usual risk of defeat." *Id.*, at 1255, 1256.

Chief Judge Tjoflat concurred specially. He agreed that Plan 386 was constitutional but thought that the new plan could not be approved without a judicial determination that Plan 330 was unconstitutional, as he concluded it was. *Id.*, at 1256–1257.

We noted probable jurisdiction, 519 U. S. 926 (1996), and now affirm.

II

A

Appellant argues that the District Court erred in approving the settlement agreement without formally holding Plan 330 unconstitutional, thereby denying the State's legislature and Supreme Court the opportunity to devise a new redistricting plan.[3] See Brief for Appellant 23, 32–33. Appellant relies on *Growe* v. *Emison,* 507 U. S. 25 (1993), in which we recognized that "'reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court' [and that] [a]bsent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state apportionment nor permit federal litigation to be used to impede it." *Id.,* at 34 (quoting *Chapman* v. *Meier,* 420 U. S. 1, 27 (1975)). Appellant cites *Wise* v. *Lipscomb,* 437 U. S. 535 (1978), for the proposition that when a federal court declares an existing apportionment plan unconstitutional, it should, if possible, afford "a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than . . . devise and order into effect its own plan." *Id.,* at 540 (opinion of White, J.). Appellant claims that the District Court's approval of the settlement agreement without first holding Plan 330 unconstitutional impaired the State's interest in exercising "primary responsibility for apportionment of [its] federal congressional and state legislative districts," *Growe, supra,* at 34, and had the derivative effect of "eviscerat[ing] the individual rights of" appellant, as a citizen and voter, to "the liberties derived from the diffusion of sovereign power . . . to representative state government," Brief for Appellant 26.

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[3] We reject appellees' contention that appellant failed to preserve this claim for appeal. Appellant argued below that the District Court should rule on the legality of Plan 330 before approving a remedial plan, see, *e. g.*, Record 173, and appellant's statements asking that the state legislature and Supreme Court be given the opportunity to redistrict following a find-

The substance of what appellant claims as a right to the benefit of political diffusion is nothing other than the rule declared in the cases he cites, that state redistricting responsibility should be accorded primacy to the extent possible when a federal court exercises remedial power. See *Growe,* 507 U. S., at 34. A State should be given the opportunity to make its own redistricting decisions so long as that is practically possible and the State chooses to take the opportunity.

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ing of liability fairly encompass the claim he presents here. See 166 Tr. 30–31, 36–37, 39, 40 (Oct. 26, 1995); 180 Tr. 15–16 (Nov. 2, 1995).

Ibid. When it does take the opportunity, the discretion of the federal court is limited except to the extent that the plan itself runs afoul of federal law.

In this case, the State has selected its opportunity by entering into the settlement agreement, which for reasons set out below in Part II–B it had every right to do. And it has availed itself of that opportunity by proposing a plan as embodied in the settlement agreement. There can be no question on the present record that proponents of the plan included counsel authorized to represent the State itself, and there is no reason to suppose that the State's attorney general lacked authority to propose a plan as an incident of his authority to represent the State in this litigation.[4] The evidence, indeed, was entirely in his favor. The participation of counsel for each legislative chamber confirmed both the continuing refusal of the legislature to address the issue in formal session and the authority of the attorney general to propose the settlement plan on the State's behalf.[5]

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[4] The dissent argues that Article III, § 16, of the Florida Constitution provides the exclusive means by which redistricting can take place. See *post*, at 585–586, and n. 2. But this article in terms provides only that the state legislature is bound to redistrict within a certain time after each decennial census, for which it may be required to convene. See Fla. Const., Art. III, § 16(a). The dissent says that the state legislature is "implicitly *authorized* to reapportion" after an existing plan is held unconstitutional and, further, that the Supreme Court of Florida has "by implication" the authority to redraw districts in the event a federal court invalidates a redistricting plan on constitutional grounds. See *post*, at 585–586, n. 2. We disagree on this question of state law only insofar as the dissent views this implicit authority to limit the broad discretion possessed by the attorney general of Florida in representing the State in litigation. See, *e. g., Ervin* v. *Collins*, 85 So. 2d 852, 854 (Fla. 1956) (noting that, under Florida law, "the Attorney General as the chief law officer of the state and absent express legislative restriction to the contrary, may exercise his power and authority in the premises [the power to litigate] as the public interest may require"); see also *State ex rel. Shevin* v. *Yarborough*, 257 So. 2d 891, 894–896 (Fla. 1972) (Ervin, J., specially concurring). Absent a state-court determination to the contrary, we do not see Article III, § 16, as placing the attorney general's settling authority in doubt, over against his representation to the contrary.

On these facts, the District Court's approval of the settlement agreement was entirely consistent with the principles underlying our cases that have granted relief on the ground that a district court had failed to respect the affected government's entitlement to originate its own redistricting policy. Since the State, through its attorney general, has taken advantage of the option recognized in *Growe* and *Wise* to make redistricting decisions in the first instance, there are no reasons in those cases to burden its exercise of choice by requiring a formal adjudication of unconstitutionality.

B

We find no merit, either, in appellant's apparently distinct claim that, regardless of any effect on the State's districting responsibility, the District Court was bound to adjudicate liability before settlement because appellant did not agree to settle. See Brief for Appellant 27. "It has never been supposed that one party—whether an original party, a party that was joined later, or an intervenor—could preclude other parties from settling their own disputes." *Firefighters* v. *Cleveland*, 478 U. S. 501, 528–529 (1986).[6] While appellant was entitled to present evidence and have his objections heard at the hearing to consider approval of the agreement, he "does not have power to block the decree merely by withholding [his] consent." *Id.*, at 529; cf. 7B C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1797.1, p. 412 (2d ed. 1986) (fact of opposition does not necessitate disapproval of class-action settlement under Federal Rule of Civil Procedure 23). While a settlement agreement subject to court approval in a nonclass action may not impose duties or obligations on an unconsenting party or "dispose" of his claims, see *Firefighters, supra,* at 529, the agreement here did none of those things. It disposed of appellant's claim not in the forbidden sense of cutting him off from a remedy to which he was entitled, but only in the legitimate sense of granting him an element of the very relief he had sought. As a remedy for what appellant claimed to be an unconstitutional plan he had requested the elimination of that plan, and the settlement and decree gave him that relief. To afford him a right to the formality of a decree in addition to the substance of the relief sought would be to allow a sore winner to obscure the point of the suit. In most civil litigation, and in this suit in particular, "the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces . . . . The real value of the judicial pronouncement—what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion—is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*" *Hewitt* v. *Helms,* 482 U. S. 755, 761 (1987).

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[5] The District Court indicated that it would look to the Florida House and Senate as an initial matter to fashion any new districting plan, see Tr. 14, 18–19, 21–22 (Sept. 27, 1995), and directed the state appellees to file a monthly "report informing the Court of any formal actions initiated by any public official or branch of government regarding Florida's senatorial 'reapportionment plan.'" Record 78, at 5. The Florida Senate filed such status reports as directed, indicating that apart from the ongoing litigation, no formal actions had been initiated by any public official or branch of state government regarding Florida's senatorial plan. Record 121, 141, 160.

The dissent challenges the authority of those representing the State House and Senate to speak for those bodies and further claims that even if they were authorized, the District Court was required to "demand clearer credentials" on their part. See *post,* at 586. However this may be, the State was represented by the attorney general and it is by virtue of his agreement as counsel that the State was a party to the agreement. The settlement and subsequent judgment do not, of course, prevent the state legislature from redistricting yet again. See App. 19.

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[6] Notwithstanding the dissent's claim, see *post,* at 584, nothing in *Firefighters* limits its rule to remedial consent decrees that follow an adjudication of liability. To the contrary, the holding in *Firefighters* was expressly based on the principle that "it is the parties' agreement that serves as the source of the court's authority to enter any [consent] judgment at all," 478 U. S., at 522, and our opinion in that case makes no reference to any findings of liability.

Appellant, of course, wanted something more than being rid of Plan 330, for he wanted a new plan that would be constitutional. But insofar as he would have been entitled to that following a formal decree of the court, he is now in the same position he would have enjoyed if he had had such a decree: his views on the merits of the proposed plan were heard, and his right to attack it in this appeal is entirely unimpaired. To the extent that he claims anything more, he is trying to do what we have previously said he may not do: to demand an adjudication that the State of Florida, represented by the attorney general, could indeed have demanded, see *Growe,* 507 U. S., at 34; *Wise,* 437 U. S., at 540 (opinion of White, J.), but instead waived.

III

The District Court concluded that Plan 386 did not subordinate traditional districting principles to race.[7] See 920 F. Supp., at 1254–1255. That finding is subject to review for clear error, see *Miller,* 515 U. S., at 915–917, of which we find none.

The District Court looked to the shape and composition of District 21 as redrawn in Plan 386 and found them "demonstrably benign and satisfactorily tidy." 920 F. Supp., at 1255. The district is located entirely in the Tampa Bay area, has an end-to-end distance no greater than that of most Florida Senate districts,[8] and in shape does not stand out as different from numerous other Florida House and Senate districts. See App. 26, 60–75. While District 21 crosses a body of water and encompasses portions of three counties, evidence submitted showed that both features are common characteristics of Florida legislative districts, being products of the State's geography and the fact that 40 Senate districts are superimposed on 67 counties. See *id.*, at 28, 32–33.[9]

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[7] There is no merit to appellant's contention that the District Court failed to adjudicate the constitutionality of District 21. See Brief for Appellant 35. The District Court noted the deference due the State, and expressly held Plan 386 to be constitutional. 920 F. Supp. 1248, 1255, 1256 (MD Fla. 1996) ("Plan 386 passes any pertinent test of constitutionality and fairness").

Addressing composition, the District Court found that the residents of District 21 "regard themselves as a community." 920 F. Supp., at 1255. Evidence indicated that District 21 comprises a predominantly urban, low-income population, the poorest of the nine districts in the Tampa Bay region and among the poorest districts in the State, whose white and black members alike share a similarly depressed economic condition, see App. 30–31, 49–51, and interests that reflect it, *id.*, at 149–154. The fact that District 21 under Plan 386 is not a majority black district, the black voting-age population being 36.2%, supports the District Court's finding that the district is not a "safe" one for black-preferred candidates, but one that "offers to any candidate, without regard to race, the opportunity" to seek and be elected to office. 920 F. Supp., at 1256.

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[8] The distance is 50 miles and record evidence indicates that only 15 of the 40 Senate districts in Florida cover less distance from end-to-end. See App. 26.

[9] The Supreme Court of Florida has held that the presence in a district of a body of water, even without a connecting bridge and even if such districting necessitates land travel outside the district to reach other parts of the district, "does not violate this Court's standard for determining contiguity under the Florida Constitution." *In re Constitutionality of Senate Joint Resolution 2G*, 597 So. 2d 276, 280 (Fla. 1992).

In addition, only 9 of the State's 40 Senate districts are located within a single county, and 5 of those are within Dade County. See App. 33. Multicounty districting also increases the number of legislators who can speak for each county, a districting goal traditionally pursued in the State. See *id.*, at 32, and n. 7.

Based on these and other considerations,[10] the District Court concluded that traditional districting principles had not been subordinated to race in drawing revised District 21. Appellant calls this finding clearly erroneous, charging that District 21 encompasses more than one county, crosses a body of water, is irregular in shape, lacks compactness, and contains a percentage of black voters significantly higher than the overall percentage of black voters in Hillsborough, Manatee, and Pinellas Counties. Brief for Appellant 40–45. Appellant's first four points ignore unrefuted evidence showing that on each of these points District 21 is no different from what Florida's traditional districting principles could be expected to produce. See *supra*, at 580–581. As to appellant's final point, we have never suggested that the percentage of black residents in a district may not exceed the percentage of black residents in any of the counties from which the district is created, and have never recognized similar racial composition of different political districts as being necessary to avoid an inference of racial gerrymandering in any one of them. Since districting can be difficult, after all, just because racial composition varies from place to place, and counties and voting districts do not depend on common principles of size and location, facts about the one do not as such necessarily entail conclusions about the other.

In short, the evidence amply supports the trial court's views that race did not predominate over Florida's traditional districting principles in drawing Plan 386. Appellant has provided nothing that calls that conclusion into question, much less that points to any clear error.

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[10] Record evidence indicates that the design of revised District 21 was also affected by the need to satisfy one-person, one-vote requirements, App. 28, the desire to retain the existing partisan balance in the Senate, *id.*, at 31, and the desire to avoid out-of-cycle elections, *id.*, at 28–29. See also *In re Apportionment Law*, 414 So. 2d 1040, 1047–1050 (Fla. 1982) (special elections must be held when district boundaries are changed, disrupting staggered Senate terms).

We accordingly affirm the decision of the District Court.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE THOMAS join, dissenting.

The Court today affirms a Federal District Court's redrawing of Florida Senate District 21, despite the fact that the District Court never determined that District 21 was unconstitutional, and never gave the State an opportunity to do its own redrawing of the district to remedy whatever unconstitutional features it contained. In my view, the District Court's actions represent an unprecedented intrusion upon state sovereignty.

I

The District Court held that it could exercise its authority under the Fourteenth Amendment to "compel the nullification and re-establishment of state legislative boundaries" without finding a violation of the Fourteenth Amendment, so long as "the case presents a sufficient evidentiary and legal basis to warrant the *bona fide* intervention of a federal court into matters typically reserved to a state." 920 F. Supp. 1248, 1251–1252 (MD Fla. 1996). Although acknowledging that the "'[d]efendants and defendant-intervenors deny these assertions [of unconstitutionality],'" *id.*, at 1252–1253, n. 3 (quoting Settlement Agreement), the District Court determined that the claim that District 21 was unconstitutional was "fairly litigable," *id.*, at 1253, n. 3, and found this enough to justify its reapportionment order.

The only authority cited by the District Court for the proposition that a court can mandate a remedy without finding liability is JUSTICE O'CONNOR's concurring opinion in *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 284 (1986). But that opinion has no bearing on the present case. It dealt with the question whether a school board could, consistent with the Constitution, implement an affirmative-action program without first making contemporaneous findings that such a program is justified by specific instances of past discrimination. *Id.*, at 289–291. Quite obviously, whether a State may take *voluntary* action without first determining that it has violated the law has nothing to do with whether a federal court may *impose* a remedy without first determining that the State has violated the law.

The Court evidently believes that an adjudication of unconstitutionality of District 21 was unnecessary here because the State entered into a consent agreement accepting judicial imposition of Plan 386. For this proposition it relies upon *Firefighters* v. *Cleveland*, 478 U. S. 501 (1986), which said that "it is the parties' agreement that serves as the source of the [District Court's] authority to enter . . . judgment . . . ." *Id.*, at 522. However, that passage from *Firefighters* is of no help to the Court—even putting aside the fact that the "agreement" there at issue, unlike the one here, was an agreement to remedy unlawful conduct (a "pattern of racial discrimination") that *had been adjudged*, *id.*, at 506, 511–512.[1] *Firefighters* was a Title VII action by minority firefighters, alleging that the city discriminated against them in promotions. A union representing the majority of the city's firefighters intervened as a party-plaintiff and objected to the settlement, contending, among other things, that its consent was required in order for the District Court to enter a consent decree. We disagreed. The minority firefighters and the city, we said, could have reached an out-of-court agreement to resolve their dispute. See *id.*, at 522–523, and

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[1] I am puzzled by the Court's assertion that "our opinion in *[Firefighters]* makes no reference to any findings of liability." *Ante*, at 579, n. 6. We said: "Judge Lambros found that '[t]he documents, statistics, and testimony presented at [the] hearings reveal a historical pattern of racial discrimination in the promotions in the City of Cleveland Fire Department.'" *Firefighters*, 478 U. S., at 511–512 (quoting *Vanguards of Cleveland* v. *Cleveland*, Civ. Action C–80–1964 (ND Ohio, Jan. 31, 1983), reprinted in Brief in Opposition in *Firefighters* v. *Cleveland*, O. T. 1986, No. 84–1999, pp. A3–A4).

n. 13. "[T]he choice of an enforcement scheme—whether to rely on contractual remedies or to have an agreement entered as a consent decree—is itself made voluntarily by the parties." *Id.*, at 523.

In today's case, by contrast, neither the appellant nor the other original plaintiffs (now appellees) could have concluded a binding out-of-court "redistricting agreement" with representatives of the Florida Legislature, or with the state attorney general—and the Court does not contend otherwise. The Florida Constitution, Art. III, § 16, requires the legislature to draw districts "by joint resolution," and provides no authority for the attorney general to do so.[2] Any "redis-

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[2] The Florida Legislature is explicitly *required* to reapportion "at its regular session in the second year following each decennial census." Fla. Const., Art. III, § 16(a). It seems obvious that the legislature is implicitly *authorized* to reapportion when its prior reapportionment has been held unconstitutional. See *In re Constitutionality of Senate Joint Resolution 2G*, 601 So. 2d 543, 544 (Fla. 1992); Tr. 29–30 (July 6, 1995) (view of counsel for the Florida House of Representatives); Record 93, at 2 (view of District 21's incumbent Senator). I cannot imagine any basis for asserting that anyone else, such as the attorney general, has authority to reapportion (by exercising his "settling authority," *ante*, at 577, n. 4), when the State's last reapportionment has *not* been invalidated. While the Court is correct that the attorney general has broad discretion in representing Florida in litigation, see *ibid.*, neither the two cases it cites nor any I could find comes even close to permitting the attorney general to agree with a private citizen to redistrict the State. The Court also asserts, without citation, that "counsel for each legislative chamber confirmed . . . the authority of the attorney general to propose the settlement plan on the State's behalf." *Ante*, at 577–578. I am unaware of any such confirmation, and the record actually suggests there was none. See Tr. 29–30 (July 6, 1995) (view of counsel for the Florida House of Representatives); Record 93, at 2 (view of District 21's incumbent Senator).

Moreover, under the Florida Constitution the prescribed body to reapportion when the legislature has failed to do so is the Florida Supreme Court. The Florida Constitution itself states this explicitly with regard to the legislature's failure to act after the decennial census, Fla. Const., Art. III, § 16; and the Florida Supreme Court has held that it has authority to reapportion (absent legislative action) in the event of Justice Department refusal of preclearance, and hence by implication in the event of tricting agreement" entered into by these officials with individual voters would obviously be null and void. And a court decree that does not purport to be in remediation of an adjudged violation of law cannot make it binding. See *Firefighters, supra,* at 522–523. See also, *e. g., Perkins* v. *Chicago Heights,* 47 F. 3d 212, 216 (CA7 1995).

These principles would suffice to invalidate an unauthorized private agreement as the basis for a federal judicial decree in even the ordinary case, but they should apply even more rigorously to an agreement purportedly supporting a federal judicial decree of state reapportionment, which we have described as an "unwelcome obligation," *Connor* v. *Finch,* 431 U. S. 407, 415 (1977), that should be undertaken by a district court only as a last resort, see, *e. g., White* v. *Weiser,* 412 U. S. 783 (1973). Indeed, even if it were possible for the Florida Legislature to authorize two of its members to negotiate an apportionment agreement that could be the basis for a federal court decree, one would think that the special solicitude we have shown for preservation of the States' apportionment authority would cause the court to demand clearer credentials on the part of those who purport to speak for the legislature.[3] The District Court asserted that "Florida's House and Senate . . . manifested . . . the authority to consent," 920 F. Supp., at 1251, but it points to no resolu-

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federal-court invalidation, see *In re Constitutionality of Senate Joint Resolution 2G, supra,* at 544–545.

[3] The Court is of the view that participation by Florida's legislative branches was beside the point, and that the attorney general alone could propose a redistricting plan and settle this lawsuit without participation by the legislature. See *ante,* at 578, n. 5. I know of no support for this proposition, and the Court provides none. Moreover, this view is contrary to that of the District Court. See 920 F. Supp. 1248, 1252–1253, n. 3 (MD Fla. 1996); *id.,* at 1255 ("Foremost among the factors commending the proposed resolution in this action is the consent of Florida's Senate and House . . ."); *ibid.* ("[P]roposed District 21, like present District 21, is primarily a *legislative action* and is advanced . . . by this court preeminently for that reason" (emphasis added)).

tion conferring such authority upon the individual legislators before the court; and as to the Senate, at least, there is some evidence no such authority exists. The record contains a letter from State Senator Howard C. Forman to the District Court reading in part as follows:

> "This letter is intended to communicate to you in the strongest possible terms that the Florida Senate has not agreed to any proposed settlement. As a constitutionally established collegial body, the Florida Senate can agree to nothing without open debate and action by the entire body. As a duly elected Member of the Florida Senate, I have never waived my constitutional duty and responsibility to participate in all Senate matters. And, under no circumstances does any individual Senator, or group of individual Senators, have the right to agree to anything in my name. . . .
>
> "Therefore, I challenge any representation that the Florida Senate has agreed to any proposed settlement in this case." Record 152.

But in fact all these inquiries into authorization to enter private agreements are supererogatory. Even an *authorized* private agreement cannot serve as the basis for a federal apportionment decree. We have said explicitly, and in unmistakable terms, that "[f]ederal courts are *barred* from intervening in state apportionment in the absence of a *violation* of federal law." *Voinovich* v. *Quilter*, 507 U. S. 146, 156 (1993) (emphasis added). As Chief Judge Tjoflat's concurrence below correctly stated, "to enter the judgment in question, the court must find that District 21 is unconstitutional." 920 F. Supp., at 1256–1257. I would adhere to that principle.

Finally, I find no merit in the Court's apparent suggestion, *ante*, at 578–580, that appellant has no standing to complain of this defect. A judicial decree entered without jurisdiction has mooted his suit. Surely that is enough to sustain his appeal.

II

The District Court's failure to find the pre-existing District 21 unconstitutional is alone enough to require reversal of the judgment. But the District Court committed a second error, in failing to give the Florida Legislature the opportunity to redraw the district before imposing a court-ordered solution. We have repeatedly emphasized that federal interference with state districting "represents a serious intrusion on the most vital of local functions," *Miller* v. *Johnson,* 515 U. S. 900, 915 (1995), and that "reapportionment[, which] is primarily the duty and responsibility of the State," *Chapman* v. *Meier,* 420 U. S. 1, 27 (1975), " 'is primarily a matter for legislative consideration and determination,' " *Connor* v. *Finch, supra,* at 414 (quoting *Reynolds* v. *Sims,* 377 U. S. 533, 586 (1964)). " '[J]udicial relief becomes appropriate,' " we have said, " 'only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.' " *White* v. *Weiser, supra,* at 794–795 (quoting *Reynolds, supra,* at 586). See also *Growe* v. *Emison,* 507 U. S. 25, 33–34 (1993); *Upham* v. *Seamon,* 456 U. S. 37, 41–42 (1982) *(per curiam); McDaniel* v. *Sanchez,* 452 U. S. 130, 142 (1981); *Wise* v. *Lipscomb,* 437 U. S. 535, 540 (1978) (opinion of White, J.). The District Court's failure to give Florida a reasonable opportunity to craft its own solution after a judicial finding that the current districting was unconstitutional—or even (since here such a finding was never made) after the judicial finding that a constitutional claim is "fairly litigable"—was most assuredly error.

The District Court repeatedly referred to Plan 386 as a "legislative solution," 920 F. Supp., at 1255, and the concurrence described it as a "plan that the Florida legislature has proposed," *id.,* at 1257. But judicial characterization does not overcome reality. The fact that the Speaker of Florida's House of Representatives and the President of Florida's Senate participated in the negotiations and consented to the settlement does not magically convert Plan 386 into a Florida law. The "opportunity to apportion" that our case law requires the state legislature to be afforded is an opportunity to apportion through normal legislative processes, not through courthouse negotiations attended by one member of each House, followed by a court decree.

Appellees contend that the District Court actually offered the legislature the opportunity to redistrict, but that the legislature declined. This contention is based upon the fact that the representatives of the Florida Legislature informed the District Court, prior to any proceedings on the merits, that the legislature would likely not *sua sponte* redraw the districts in response to *Miller* v. *Johnson, supra,* and on the status reports filed by the Florida Senate, see *ante,* at 578, n. 5. But the requisite opportunity that our cases describe is an opportunity to redraw districts after the extant districts have been ruled unconstitutional—not after a Supreme Court case has been announced which may or may not ultimately lead to a ruling that the extant districts are unconstitutional. See, *e. g., Growe, supra,* at 34; *McDaniel, supra,* at 142; *Reynolds, supra,* at 585–586. The State is under no obligation to redistrict unless and until a determination has been made that there has been a violation of federal law.

* * *

Because the District Court lacked the authority to mandate redistricting without first having found a constitutional violation; and because the District Court failed to give the State an opportunity to redistrict on its own after notice of the constitutional violation (or even after notice of the court's intention to proceed with its own plan), I would reverse the judgment of the District Court and remand for further proceedings. Given my conclusion on appellant's first two challenges to the District Court's judgment, I have no occasion to consider the constitutionality of the court-drawn district, Plan 386.

I respectfully dissent.

AMCHEM PRODUCTS, INC., ET AL. *v.* WINDSOR ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 96–270. Argued February 18, 1997—Decided June 25, 1997

This case concerns the legitimacy under Rule 23 of the Federal Rules of Civil Procedure of a class-action certification sought to achieve global settlement of current and future asbestos-related claims. Never intending to litigate, the settling parties—petitioners and the representatives of the plaintiff class described below—presented to the District Court a class-action complaint, an answer, a proposed settlement agreement, and a joint motion for conditional class certification. The complaint identifies nine lead plaintiffs, designating them and members of their families as representatives of a class comprised of all persons who had not previously sued any of the asbestos-manufacturing companies that are petitioners in this suit, but who (1) had been exposed—occupationally or through the occupational exposure of a spouse or household member—to asbestos attributable to a petitioner, or (2) whose spouse or family member had been so exposed. Potentially hundreds of thousands, perhaps millions, of individuals may fit this description. All named plaintiffs alleged exposure; more than half of them alleged already manifested physical injuries; the others, so-called "exposure-only" claimants, alleged that they had not yet manifested any asbestos-related condition. The complaint delineated no subclasses; all named plaintiffs were designated as representatives of the entire class.

The exhaustive agreement, *inter alia,* (1) proposed to settle, and to preclude nearly all class members from litigating, claims not previously filed against petitioners; (2) detailed an administrative mechanism and a schedule of payments to compensate class members who meet defined exposure and medical criteria; (3) described four categories of compensable cancers and nonmalignant conditions, and specified the range of damages to be paid qualifying claimants for each; (4) did not adjust payments for inflation; (5) capped the number of claims payable annually for each disease; and (6) denied compensation for family members' loss-of-consortium claims, for exposure-only plaintiffs' claims for emotional distress, enhanced risk of disease, and medical monitoring, and for "pleural" claims involving lung plaques but no physical impairment, even if otherwise applicable state law recognized such claims.

The District Court approved the settling parties' plan for giving notice to the class and certified the proposed class for settlement only. The court found, over numerous challenges raised by the objectors, that the settlement was fair, the court's jurisdiction properly invoked, and representation and notice adequate. Pending the issuance of a final order, the District Court enjoined class members from separately pursuing asbestos suits in any federal or state court. The Third Circuit ultimately vacated the District Court's orders. Although the objectors maintained that the case was not justiciable and that the exposure-only claimants lacked standing to sue, the Court of Appeals declined to reach these issues, reasoning that they would not exist but for the class certification. The court acknowledged that a class action may be certified for settlement only, but held that the certification requirements of Rule 23 must be met as if the case were going to be litigated, without taking the settlement into account. The court nevertheless homed in on the settlement's terms in examining aspects of the case under Rule 23 criteria. The Court of Appeals explained that certification was inappropriate because the class failed to satisfy, among other provisions, Rule 23(b)(3)'s requirement that questions common to the class "predominate over" other questions, and Rule 23(a)(4)'s adequacy of representation requirement. The court therefore ordered the class decertified.

Held:

1. The class certification issues are dispositive here in that their resolution is logically antecedent to the existence of any Article III issues. This Court therefore declines to resolve objectors' assertions that no justiciable case or controversy is presented and that the exposure-only claimants lack standing to sue. Cf. *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 66–67. The Court follows this path mindful that Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act's instruction that procedural rules not abridge, enlarge, or modify any substantive right. Pp. 612–613.

2. The sprawling class the District Court certified does not satisfy Rule 23's requirements. Pp. 613–629.

(a) Rule 23 gained its current shape in a 1966 revision. Its subdivisions (a) and (b) enumerate criteria that must be met for a class to be certified. Rule 23(b)(3) was the most adventuresome innovation of the 1966 Amendments, permitting judgments for money that would bind all class members save those who opt out. To gain certification under Rule 23(b)(3), a class must satisfy the requirements of Rule 23(a), among them, that named class representatives will fairly and adequately protect class interests; the class must also meet the Rule 23(b)(3) criteria that common questions "predominate over any questions affecting only individual members" and that class resolution be "superior to other available methods for the fair and efficient adjudication of the controversy." To alert Rule 23(b)(3) class members to their right to "opt out," Rule 23 requires "the best notice practicable under the circumstances." Rule 23(c)(2). Finally, Rule 23(e) specifies that a class action cannot be settled without the court's approval, and that notice of the proposed compromise must be given to all class members in such manner as the court directs. Pp. 613–619.

(b) Because settlement is relevant to the propriety of class certification, the Third Circuit's statement that Rule 23(a) and (b)(3) "must be satisfied without taking into account the settlement" bears modification. But the Third Circuit did not, in fact, ignore the settlement. The court homed in on settlement terms in explaining why it found absentees' interests inadequately represented. The Third Circuit's inspection of the settlement agreement in that regard was altogether proper. Whether trial would present intractable management problems, see Rule 23(b)(3)(D), is not a consideration when settlement-only certification is requested, for the proposal is that there be no trial. But other specifications of the Rule designed to protect absentee class members by blocking unwarranted or overbroad class definitions are of vital importance in the settlement context, for the court in such a case will lack the opportunity to adjust the class as litigation unfolds. See Rule 23(c) and (d). And, of overriding importance, courts must be mindful that they are bound to enforce the Rule as now composed, for Federal Rules may be amended only through the extensive deliberative process Congress prescribed. Rule 23(e)'s settlement prescription was designed to function as an additional requirement, not a superseding direction, to the class-qualifying criteria of Rule 23(a) and (b). Cf. *Eisen* v. *Carlisle & Jacquelin,* 417 U. S. 156, 176–177. The dominant concern of Rule 23(a) and (b)—that a proposed class have sufficient unity so that absentees can fairly be bound by class representatives' decisions—persists when settlement, rather than trial, is proposed. Those subdivisions' safeguards provide practical checks in the settlement context. First, their standards serve to inhibit class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness. Second, if a Rule 23(e) fairness inquiry controlled certification, eclipsing Rule 23(a) and (b), and permitting certification despite the impossibility of litigation, both class counsel and court would be disarmed. Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer, and the court would face a bargain proffered for its approval without benefit of adversarial investigation. Federal courts, in any case, lack authority to substitute for Rule 23's certification criteria a standard never adopted by the rulemakers—that if a settlement is "fair," then certification is proper. Pp. 619–622.

(c) Rule 23(b)(3)'s predominance requirement is not met by the factors relied on by the District Court and the settling parties: class members' shared experience of asbestos exposure; their common interest in receiving prompt and fair compensation, while minimizing the risks and transaction costs inherent in the tort system's asbestos litigation process; and the settlement's fairness. The benefits asbestos-exposed persons might gain from a grand-scale compensation scheme is a matter fit for legislative consideration, but it is not pertinent to the predominance inquiry. That inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement, and tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. In contrast, the Rule 23(e) inquiry protects unnamed class members from unjust or unfair settlements agreed to by fainthearted or self-interested class representatives; the Rule 23(e) prescription was not designed to assure the class cohesion that legitimizes representative action in the first place. If a common interest in a fair compromise could satisfy Rule 23(b)(3)'s predominance requirement, that vital prescription would be stripped of any meaning in the settlement context. The predominance criterion is not satisfied by class members' shared experience of asbestos exposure, given the greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions. No settlement class called to the Court's attention is as sprawling as the one certified here. Although mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement, the Advisory Committee for the 1966 Rule 23 revision advised that such cases are ordinarily not appropriate for class treatment, and warned district courts to exercise caution when individual stakes are high and disparities among class members great. The certification in this case does not follow the counsel of caution. That certification cannot be upheld, for it rests on a conception of Rule 23(b)(3)'s predominance requirement irreconcilable with the Rule's design. Pp. 622–625.

(d) Nor can the class approved by the District Court satisfy Rule 23(a)(4)'s adequate representation inquiry. That inquiry serves to uncover conflicts of interest between named parties and the class they seek to represent. See *General Telephone Co. of Southwest* v. *Falcon*, 457 U. S. 147, 157–158, n. 13. Representatives must be part of the class and possess the same interest and suffer the same injury as the class members. *E. g., East Tex. Motor Freight System, Inc.* v. *Rodriguez,* 431 U. S. 395, 403. In this case, named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future. Cf. *General Telephone Co. of Northwest* v. *EEOC,* 446 U. S. 318, 331. The disparity between the currently injured and exposure-only categories of plaintiffs, and the diversity within each category, are not made insignificant by the District Court's finding that petitioners' assets suffice to pay settled claims. Although this is not a Rule 23(b)(1)(B) "limited fund" case, the settlement's terms—*e. g.*, no inflation adjustments, only a few claimants per year permitted to opt out at the back end, and loss-of-consortium claims extinguished—reflect essential allocation decisions designed to confine compensation and to limit defendants' liability. Thus, the settling parties achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. The Third Circuit found no assurance here that the named parties operated under a proper understanding of their representational responsibilities. That assessment is on the mark. Pp. 625–628.

(e) In light of the conclusions that the class does not satisfy the requirements of common issue predominance and adequacy of representation, this Court need not rule, definitively, on the adequacy of the notice given here. The Court recognizes, however, the gravity of the question whether class-action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous as the class certified by the District Court. P. 628.

(f) The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution. Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load the settling parties and the District Court heaped upon it. Pp. 628–629.

83 F. 3d 610, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. BREYER, J., filed an opinion concurring in part and dissenting in part, in which

STEVENS, J., joined, *post*, p. 629. O'CONNOR, J., took no part in the consideration or decision of the case.

Stephen M. Shapiro argued the cause for petitioners. With him on the briefs were *John D. Aldock, Elizabeth Runyan Geise, Richard M. Wyner, Kenneth S. Geller, Andrew J. Pincus, Charles A. Rothfeld, Eileen Penner, Robert H. Bork, Max Gitter, Blake Perkins,* and *Nancy B. Stone.*

Laurence H. Tribe argued the cause and filed a brief for respondent Windsor et al. With him on the brief were *Brian Koukoutchos, Jonathan S. Massey, Frederick M. Baron, Brent M. Rosenthal,* and *Steve Baughman. Brad Seligman, Jocelyn D. Larkin, Donna M. Ryu, Sharon R. Vinick,* and *Steven Kazan* filed a brief for respondent Cargile et al. *Shepard A. Hoffman* filed a brief for respondent Balonis et al. *Ronald L. Motley, Joseph F. Rice, Nancy Worth Davis, Gene Locks,* and *Jonathan W. Miller* filed a brief for respondent Georgine et al. *Brian Wolfman* and *Alan B. Morrison* filed a brief for respondent White Lung Association of New Jersey et al.*

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*Briefs of *amici curiae* urging reversal were filed for the National Association of Securities and Commercial Lawyers by *Kevin P. Roddy, Clinton A. Krislov,* and *Robert J. Stein III;* for the Chamber of Commerce of the United States by *John H. Beisner, Brian D. Boyle, Stephen A. Bokat,* and *Robin S. Conrad;* for Rhone-Poulenc Rorer Inc. et al. by *Carter G. Phillips, Richard L. Berkman,* and *Fred T. Magaziner;* and for the Washington Legal Foundation by *Daniel J. Popeo.*

Briefs of *amici curiae* urging affirmance were filed for the State of New York et al. by *Dennis C. Vacco,* Attorney General of New York, *Barbara Gott Billet,* Solicitor General, *Shirley F. Sarna, Nancy Spiegel, Joy Feigenbaum,* and *Jane M. Kimmel,* Assistant Attorneys General, *Daniel E. Lungren,* Attorney General of California, *Thomas F. Gede,* Special Assistant Attorney General, and *Albert Norman Shelden,* Supervising Deputy Attorney General, *Charles P. C. Ruff,* Corporation Counsel of the District of Columbia, and by the Attorneys General of their respective jurisdictions as follows: *Winston Bryant* of Arkansas, *M. Jane Brady* of Delaware, *Alan G. Lance* of Idaho, *Carla J. Stovall* of Kansas, *Albert B. Chandler III* of Kentucky, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Joseph P. Mazurek* of Montana, *Frankie Sue Del Papa* of Ne-

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the legitimacy under Rule 23 of the Federal Rules of Civil Procedure of a class-action certification sought to achieve global settlement of current and future asbestos-related claims. The class proposed for certification potentially encompasses hundreds of thousands, perhaps millions, of individuals tied together by this commonality: Each was, or some day may be, adversely affected by past exposure to asbestos products manufactured by one or more of 20 companies. Those companies, defendants in the lower courts, are petitioners here.

The United States District Court for the Eastern District of Pennsylvania certified the class for settlement only, finding that the proposed settlement was fair and that representation and notice had been adequate. That court enjoined class members from separately pursuing asbestos-related personal-injury suits in any court, federal or state, pending the issuance of a final order. The Court of Appeals for the Third Circuit vacated the District Court's orders, holding that the class certification failed to satisfy Rule 23's requirements in several critical respects. We affirm the Court of Appeals' judgment.

I

A

The settlement-class certification we confront evolved in response to an asbestos-litigation crisis. See *Georgine* v. *Amchem Products, Inc.*, 83 F. 3d 610, 618, and n. 2 (CA3 1996) (citing commentary). A United States Judicial Con-

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vada, *Michael F. Easley* of North Carolina, *Heidi Heitkamp* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, *James S. Gilmore III* of Virginia, and *Calvin E. Holloway, Sr.*, of Guam; for the Asbestos Victims of America by *Maynard Ungerman;* for the Association of Trial Lawyers of America by *Jeffrey Robert White* and *Howard F. Twiggs;* for Law Professors by *Charles Silver* and *Samuel Issacharoff;* for Owens-Illinois, Inc., by *James D. Miller;* and for Trial Lawyers for Public Justice by *Leslie A. Brueckner* and *Arthur H. Bryant.*

ference Ad Hoc Committee on Asbestos Litigation, appointed by THE CHIEF JUSTICE in September 1990, described facets of the problem in a 1991 report:

> "[This] is a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s. On the basis of past and current filing data, and because of a latency period that may last as long as 40 years for some asbestos related diseases, a continuing stream of claims can be expected. The final toll of asbestos related injuries is unknown. Predictions have been made of 200,000 asbestos disease deaths before the year 2000 and as many as 265,000 by the year 2015.
>
> "The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether." Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation 2–3 (Mar. 1991).

Real reform, the report concluded, required federal legislation creating a national asbestos dispute-resolution scheme. See *id.*, at 3, 27–35; see also *id.*, at 42 (dissenting statement of Hogan, J.) (agreeing that "a national solution is the only answer" and suggesting "passage by Congress of an administrative claims procedure similar to the Black Lung legislation"). As recommended by the Ad Hoc Committee, the Judicial Conference of the United States urged Congress to act. See Report of the Proceedings of the Judicial Conference of the United States 33 (Mar. 12, 1991). To this date, no congressional response has emerged.

In the face of legislative inaction, the federal courts—lacking authority to replace state tort systems with a national toxic tort compensation regime—endeavored to work with the procedural tools available to improve management of federal asbestos litigation. Eight federal judges, experienced in the superintendence of asbestos cases, urged the Judicial Panel on Multidistrict Litigation (MDL Panel), to consolidate in a single district all asbestos complaints then pending in federal courts. Accepting the recommendation, the MDL Panel transferred all asbestos cases then filed, but not yet on trial in federal courts to a single district, the United States District Court for the Eastern District of Pennsylvania; pursuant to the transfer order, the collected cases were consolidated for pretrial proceedings before Judge Weiner. See *In re Asbestos Products Liability Litigation (No. VI)*, 771 F. Supp. 415, 422–424 (JPML 1991).[1] The order aggregated pending cases only; no authority resides in the MDL Panel to license for consolidated proceedings claims not yet filed.

B

After the consolidation, attorneys for plaintiffs and defendants formed separate steering committees and began settlement negotiations. Ronald L. Motley and Gene Locks—later appointed, along with Motley's law partner Joseph F. Rice, to represent the plaintiff class in this action—cochaired the Plaintiffs' Steering Committee. Counsel for the Center for Claims Resolution (CCR), the consortium of

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[1] In a series of orders, the MDL Panel had previously denied other asbestos-case transfer requests. See *In re Asbestos and Asbestos Insulation Material Products Liability Litigation*, 431 F. Supp. 906, 910 (JPML 1977); *In re Asbestos Products Liability Litigation (No. II)*, MDL–416 (JPML Mar. 13, 1980) (unpublished order); *In re Asbestos School Products Liability Litigation*, 606 F. Supp. 713, 714 (JPML 1985); *In re Ship Asbestos Products Liability Litigation*, MDL–676 (JPML Feb. 4, 1986) (unpublished order); *In re Leon Blair Asbestos Products Liability Litigation*, MDL–702 (JPML Feb. 6, 1987) (unpublished order).

20 former asbestos manufacturers now before us as petitioners, participated in the Defendants' Steering Committee.[2] Although the MDL Panel order collected, transferred, and consolidated only cases already commenced in federal courts, settlement negotiations included efforts to find a "means of resolving . . . future cases." Record, Doc. 3, p. 2 (Memorandum in Support of Joint Motion for Conditional Class Certification); see also *Georgine* v. *Amchem Products, Inc.*, 157 F. R. D. 246, 266 (ED Pa. 1994) ("primary purpose of the settlement talks in the consolidated MDL litigation was to craft a national settlement that would provide an alternative resolution mechanism for asbestos claims," including claims that might be filed in the future).

In November 1991, the Defendants' Steering Committee made an offer designed to settle all pending and future asbestos cases by providing a fund for distribution by plaintiffs' counsel among asbestos-exposed individuals. The Plaintiffs' Steering Committee rejected this offer, and negotiations fell apart. CCR, however, continued to pursue "a workable administrative system for the handling of future claims." *Id.*, at 270.

To that end, CCR counsel approached the lawyers who had headed the Plaintiffs' Steering Committee in the unsuccessful negotiations, and a new round of negotiations began; that round yielded the mass settlement agreement now in controversy. At the time, the former heads of the Plaintiffs' Steering Committee represented thousands of plaintiffs with then-pending asbestos-related claims—claimants the parties to this suit call "inventory" plaintiffs. CCR indicated in these discussions that it would resist settlement of inventory cases absent "some kind of protection for the future." *Id.*, at 294; see also *id.*, at 295 (CCR communicated to the inventory plaintiffs' attorneys that once the CCR defendants saw a rational way to deal with claims expected to be filed in the future, those defendants would be prepared to address the settlement of pending cases).

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[2] The CCR Companies are Amchem Products, Inc.; A. P. Green Industries, Inc.; Armstrong World Industries, Inc.; Asbestos Claims Management Corp.; Certainteed Corp.; C. E. Thurston & Sons, Inc.; Dana Corp.; Ferodo America, Inc.; Flexitallic, Inc.; GAF Building Materials, Inc.; I. U. North America, Inc.; Maremont Corp.; National Services Industries, Inc.; Nosroc Corp.; Pfizer Inc.; Quigley Co.; Shook & Fletcher Insulation Co.; T & N, PLC; Union Carbide Corp.; and United States Gypsum Co. All of the CCR petitioners stopped manufacturing asbestos products around 1975.

Settlement talks thus concentrated on devising an administrative scheme for disposition of asbestos claims not yet in litigation. In these negotiations, counsel for masses of inventory plaintiffs endeavored to represent the interests of the anticipated future claimants, although those lawyers then had no attorney-client relationship with such claimants.

Once negotiations seemed likely to produce an agreement purporting to bind potential plaintiffs, CCR agreed to settle, through separate agreements, the claims of plaintiffs who had already filed asbestos-related lawsuits. In one such agreement, CCR defendants promised to pay more than $200 million to gain release of the claims of numerous inventory plaintiffs. After settling the inventory claims, CCR, together with the plaintiffs' lawyers CCR had approached, launched this case, exclusively involving persons outside the MDL Panel's province—plaintiffs without already pending lawsuits.[3]

C

The class action thus instituted was not intended to be litigated. Rather, within the space of a single day, January 15, 1993, the settling parties—CCR defendants and the representatives of the plaintiff class described below—presented to the District Court a complaint, an answer, a pro-

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[3] It is basic to comprehension of this proceeding to notice that no transferred case is included in the settlement at issue, and no case covered by the settlement existed as a civil action at the time of the MDL Panel transfer.

20 former asbestos manufacturers now before us as petitioners, participated in the Defendants' Steering Committee.[2] Although the MDL Panel order collected, transferred, and consolidated only cases already commenced in federal courts, settlement negotiations included efforts to find a "means of resolving . . . future cases." Record, Doc. 3, p. 2 (Memorandum in Support of Joint Motion for Conditional Class Certification); see also *Georgine* v. *Amchem Products, Inc.*, 157 F. R. D. 246, 266 (ED Pa. 1994) ("primary purpose of the settlement talks in the consolidated MDL litigation was to craft a national settlement that would provide an alternative resolution mechanism for asbestos claims," including claims that might be filed in the future).

In November 1991, the Defendants' Steering Committee made an offer designed to settle all pending and future asbestos cases by providing a fund for distribution by plaintiffs' counsel among asbestos-exposed individuals. The Plaintiffs' Steering Committee rejected this offer, and negotiations fell apart. CCR, however, continued to pursue "a workable administrative system for the handling of future claims." *Id.*, at 270.

To that end, CCR counsel approached the lawyers who had headed the Plaintiffs' Steering Committee in the unsuccessful negotiations, and a new round of negotiations began; that round yielded the mass settlement agreement now in controversy. At the time, the former heads of the Plaintiffs' Steering Committee represented thousands of plaintiffs with then-pending asbestos-related claims—claimants the parties to this suit call "inventory" plaintiffs. CCR indicated in these discussions that it would resist settlement of inventory cases absent "some kind of protection for the future." *Id.*, at 294; see also *id.*, at 295 (CCR communicated to the inventory plaintiffs' attorneys that once the CCR defendants saw a rational way to deal with claims expected to be filed in the future, those defendants would be prepared to address the settlement of pending cases).

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[2] The CCR Companies are Amchem Products, Inc.; A. P. Green Industries, Inc.; Armstrong World Industries, Inc.; Asbestos Claims Management Corp.; Certainteed Corp.; C. E. Thurston & Sons, Inc.; Dana Corp.; Ferodo America, Inc.; Flexitallic, Inc.; GAF Building Materials, Inc.; I. U. North America, Inc.; Maremont Corp.; National Services Industries, Inc.; Nosroc Corp.; Pfizer Inc.; Quigley Co.; Shook & Fletcher Insulation Co.; T & N, PLC; Union Carbide Corp.; and United States Gypsum Co. All of the CCR petitioners stopped manufacturing asbestos products around 1975.

Settlement talks thus concentrated on devising an administrative scheme for disposition of asbestos claims not yet in litigation. In these negotiations, counsel for masses of inventory plaintiffs endeavored to represent the interests of the anticipated future claimants, although those lawyers then had no attorney-client relationship with such claimants.

Once negotiations seemed likely to produce an agreement purporting to bind potential plaintiffs, CCR agreed to settle, through separate agreements, the claims of plaintiffs who had already filed asbestos-related lawsuits. In one such agreement, CCR defendants promised to pay more than $200 million to gain release of the claims of numerous inventory plaintiffs. After settling the inventory claims, CCR, together with the plaintiffs' lawyers CCR had approached, launched this case, exclusively involving persons outside the MDL Panel's province—plaintiffs without already pending lawsuits.[3]

C

The class action thus instituted was not intended to be litigated. Rather, within the space of a single day, January 15, 1993, the settling parties—CCR defendants and the representatives of the plaintiff class described below—presented to the District Court a complaint, an answer, a proposed settlement agreement, and a joint motion for conditional class certification.[4]

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[3] It is basic to comprehension of this proceeding to notice that no transferred case is included in the settlement at issue, and no case covered by the settlement existed as a civil action at the time of the MDL Panel transfer.

The complaint identified nine lead plaintiffs, designating them and members of their families as representatives of a class comprising all persons who had not filed an asbestos-related lawsuit against a CCR defendant as of the date the class action commenced, but who (1) had been exposed—occupationally or through the occupational exposure of a spouse or household member—to asbestos or products containing asbestos attributable to a CCR defendant, or (2) whose spouse or family member had been so exposed.[5] Untold numbers of individuals may fall within this description. All named plaintiffs alleged that they or a member of their family had been exposed to asbestos-containing products of

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[4] Also on the same day, the CCR defendants filed a third-party action against their insurers, seeking a declaratory judgment holding the insurers liable for the costs of the settlement. The insurance litigation, upon which implementation of the settlement is conditioned, is still pending in the District Court. See, *e. g., Georgine* v. *Amchem Prods., Inc.*, No. 93–0215, 1994 WL 502475 (ED Pa., Sept. 2, 1994) (denying motion of insurers to compel discovery).

[5] The complaint defines the class as follows:

"(a) All persons (or their legal representatives) who have been exposed in the United States or its territories (or while working aboard U. S. military, merchant, or passenger ships), either occupationally or through the occupational exposure of a spouse or household member, to asbestos or to asbestos-containing products for which one or more of the Defendants may bear legal liability and who, as of January 15, 1993, reside in the United States or its territories, and who have not, as of January 15, 1993, filed a lawsuit for asbestos-related personal injury, or damage, or death in any state or federal court against the Defendant(s) (or against entities for whose actions or omissions the Defendant(s) bear legal liability).

"(b) All spouses, parents, children, and other relatives (or their legal representatives) of the class members described in paragraph (a) above who have not, as of January 15, 1993, filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) above in any state or federal court against the Defendant(s) (or against entities for whose actions or omissions the Defendant(s) bear legal liability)." 1 App. 13–14.

CCR defendants. More than half of the named plaintiffs alleged that they or their family members had already suffered various physical injuries as a result of the exposure. The others alleged that they had not yet manifested any asbestos-related condition. The complaint delineated no subclasses; all named plaintiffs were designated as representatives of the class as a whole.

The complaint invoked the District Court's diversity jurisdiction and asserted various state-law claims for relief, including (1) negligent failure to warn, (2) strict liability, (3) breach of express and implied warranty, (4) negligent infliction of emotional distress, (5) enhanced risk of disease, (6) medical monitoring, and (7) civil conspiracy. Each plaintiff requested unspecified damages in excess of $100,000. CCR defendants' answer denied the principal allegations of the complaint and asserted 11 affirmative defenses.

A stipulation of settlement accompanied the pleadings; it proposed to settle, and to preclude nearly all class members from litigating against CCR companies, all claims not filed before January 15, 1993, involving compensation for present and future asbestos-related personal injury or death. An exhaustive document exceeding 100 pages, the stipulation presents in detail an administrative mechanism and a schedule of payments to compensate class members who meet defined asbestos-exposure and medical requirements. The stipulation describes four categories of compensable disease: mesothelioma; lung cancer; certain "other cancers" (colon-rectal, laryngeal, esophageal, and stomach cancer); and "non-malignant conditions" (asbestosis and bilateral pleural thickening). Persons with "exceptional" medical claims—claims that do not fall within the four described diagnostic categories—may in some instances qualify for compensation, but the settlement caps the number of "exceptional" claims CCR must cover.

For each qualifying disease category, the stipulation specifies the range of damages CCR will pay to qualifying claimants. Payments under the settlement are not adjustable for inflation. Mesothelioma claimants—the most highly compensated category—are scheduled to receive between $20,000 and $200,000. The stipulation provides that CCR is to propose the level of compensation within the prescribed ranges; it also establishes procedures to resolve disputes over medical diagnoses and levels of compensation.

Compensation above the fixed ranges may be obtained for "extraordinary" claims. But the settlement places both numerical caps and dollar limits on such claims.[6] The settlement also imposes "case flow maximums," which cap the number of claims payable for each disease in a given year.

Class members are to receive no compensation for certain kinds of claims, even if otherwise applicable state law recognizes such claims. Claims that garner no compensation under the settlement include claims by family members of asbestos-exposed individuals for loss of consortium, and claims by so-called "exposure-only" plaintiffs for increased risk of cancer, fear of future asbestos-related injury, and medical monitoring. "Pleural" claims, which might be asserted by persons with asbestos-related plaques on their lungs but no accompanying physical impairment, are also excluded. Although not entitled to present compensation, exposure-only claimants and pleural claimants may qualify for benefits when and if they develop a compensable disease and meet the relevant exposure and medical criteria. Defendants forgo defenses to liability, including statute of limitations pleas.

Class members, in the main, are bound by the settlement in perpetuity, while CCR defendants may choose to withdraw from the settlement after ten years. A small number of class members—only a few per year—may reject the settlement and pursue their claims in court. Those permitted to exercise this option, however, may not assert any punitive damages claim or any claim for increased risk of cancer. Aspects of the administration of the settlement are to be monitored by the AFL–CIO and class counsel. Class counsel are to receive attorneys' fees in an amount to be approved by the District Court.

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[6] Only three percent of the qualified mesothelioma, lung cancer, and "other cancer" claims, and only one percent of the total number of qualified "non-malignant condition" claims can be designated "extraordinary." Average expenditures are specified for claims found "extraordinary"; mesothelioma victims with compensable extraordinary claims, for example, receive, on average, $300,000.

D

On January 29, 1993, as requested by the settling parties, the District Court conditionally certified, under Federal Rule of Civil Procedure 23(b)(3), an encompassing opt-out class. The certified class included persons occupationally exposed to defendants' asbestos products, and members of their families, who had not filed suit as of January 15. Judge Weiner appointed Locks, Motley, and Rice as class counsel, noting that "[t]he Court may in the future appoint additional counsel if it is deemed necessary and advisable." Record, Doc. 11, p. 3 (Class Certification Order). At no stage of the proceedings, however, were additional counsel in fact appointed. Nor was the class ever divided into subclasses. In a separate order, Judge Weiner assigned to Judge Reed, also of the Eastern District of Pennsylvania, "the task of conducting fairness proceedings and of determining whether the proposed settlement is fair to the class." See 157 F. R. D., at 258. Various class members raised objections to the settlement stipulation, and Judge Weiner granted the objectors full rights to participate in the subsequent proceedings. *Ibid.*[7]

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[7] These objectors, now respondents before this Court, include three groups of individuals with overlapping interests, designated as the "Windsor Group," the New Jersey "White Lung Group," and the "Cargile Group." Margaret Balonis, an individual objector, is also a respondent before this Court. Balonis states that her husband, Casimir, was exposed to asbestos in the late 1940's and was diagnosed with mesothelioma in May

In preliminary rulings, Judge Reed held that the District Court had subject-matter jurisdiction, see *Carlough* v. *Amchem Products, Inc.*, 834 F. Supp. 1437, 1467–1468 (ED Pa. 1993), and he approved the settling parties' elaborate plan for giving notice to the class, see *Carlough* v. *Amchem Products, Inc.*, 158 F. R. D. 314, 336 (ED Pa. 1993). The court-approved notice informed recipients that they could exclude themselves from the class, if they so chose, within a three-month opt-out period.

Objectors raised numerous challenges to the settlement. They urged that the settlement unfairly disadvantaged those without currently compensable conditions in that it failed to adjust for inflation or to account for changes, over time, in medical understanding. They maintained that compensation levels were intolerably low in comparison to awards available in tort litigation or payments received by the inventory plaintiffs. And they objected to the absence of any compensation for certain claims, for example, medical monitoring, compensable under the tort law of several States. Rejecting these and all other objections, Judge Reed concluded that the settlement terms were fair and had been negotiated without collusion. See 157 F. R. D., at 325, 331–332. He also found that adequate notice had been given to class members, see *id.*, at 332–334, and that final class certification under Rule 23(b)(3) was appropriate, see *id.*, at 315.

As to the specific prerequisites to certification, the District Court observed that the class satisfied Rule 23(a)(1)'s numerosity requirement,[8] see *ibid.*, a matter no one debates. The

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1994, after expiration of the opt-out period, see *infra* this page and 608. The Balonises sued CCR members in Maryland state court, but were charged with civil contempt for violating the Federal District Court's antisuit injunction. Casimir Balonis died in October 1996. See Brief for Balonis Respondents 9–11.

[8] Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable."

Rule 23(a)(2) and (b)(3) requirements of commonality[9] and preponderance[10] were also satisfied, the District Court held, in that

> "[t]he members of the class have all been exposed to asbestos products supplied by the defendants and all share an interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system. Whether the proposed settlement satisfies this interest and is otherwise a fair, reasonable and adequate compromise of the claims of the class is a predominant issue for purposes of Rule 23(b)(3)." *Id.*, at 316.

The District Court held next that the claims of the class representatives were "typical" of the class as a whole, a requirement of Rule 23(a)(3),[11] and that, as Rule 23(b)(3) demands,[12] the class settlement was "superior" to other methods of adjudication. See *ibid.*

Strenuous objections had been asserted regarding the adequacy of representation, a Rule 23(a)(4) requirement.[13] Objectors maintained that class counsel and class representatives had disqualifying conflicts of interests. In particular, objectors urged, claimants whose injuries had become manifest and claimants without manifest injuries should not have common counsel and should not be aggregated in a single class. Furthermore, objectors argued, lawyers representing inventory plaintiffs should not represent the newly formed class.

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[9] Rule 23(a)(2) requires that there be "questions of law or fact common to the class."

[10] Rule 23(b)(3) requires that "the [common] questions of law or fact . . . predominate over any questions affecting only individual members."

[11] Rule 23(a)(3) states that "the claims . . . of the representative parties [must be] typical of the claims . . . of the class."

[12] Rule 23(b)(3) requires that "a class action [be] superior to other available methods for the fair and efficient adjudication of the controversy."

[13] Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class."

Satisfied that class counsel had ably negotiated the settlement in the best interests of all concerned, and that the named parties served as adequate representatives, the District Court rejected these objections. See *id.*, at 317–319, 326–332. Subclasses were unnecessary, the District Court held, bearing in mind the added cost and confusion they would entail and the ability of class members to exclude themselves from the class during the three-month opt-out period. See *id.*, at 318–319. Reasoning that the representative plaintiffs "have a strong interest that recovery for *all* of the medical categories be maximized because they may have claims in *any*, or several categories," the District Court found "no antagonism of interest between class members with various medical conditions, or between persons with and without currently manifest asbestos impairment." *Id.*, at 318. Declaring class certification appropriate and the settlement fair, the District Court preliminarily enjoined all class members from commencing any asbestos-related suit against the CCR defendants in any state or federal court. See *Georgine* v. *Amchem Products, Inc.*, 878 F. Supp. 716, 726–727 (ED Pa. 1994).

The objectors appealed. The United States Court of Appeals for the Third Circuit vacated the certification, holding that the requirements of Rule 23 had not been satisfied. See 83 F. 3d 610 (1996).

E

The Court of Appeals, in a long, heavily detailed opinion by Judge Becker, first noted several challenges by objectors to justiciability, subject-matter jurisdiction, and adequacy of notice. These challenges, the court said, raised "serious concerns." *Id.*, at 623. However, the court observed, "the jurisdictional issues in this case would not exist but for the [class-action] certification." *Ibid.* Turning to the class-certification issues and finding them dispositive, the Third Circuit declined to decide other questions.

On class-action prerequisites, the Court of Appeals referred to an earlier Third Circuit decision, *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation,* 55 F. 3d 768, cert. denied, 516 U. S. 824 (1995) (hereinafter *GM Trucks*), which held that although a class action may be certified for settlement purposes only, Rule 23(a)'s requirements must be satisfied as if the case were going to be litigated. 55 F. 3d, at 799–800. The same rule should apply, the Third Circuit said, to class certification under Rule 23(b)(3). See 83 F. 3d, at 625. But cf. *In re Asbestos Litigation,* 90 F. 3d 963, 975–976, and n. 8 (CA5 1996), cert. pending, Nos. 96–1379, 96–1394. While stating that the requirements of Rule 23(a) and (b)(3) must be met "without taking into account the settlement," 83 F. 3d, at 626, the Court of Appeals in fact closely considered the terms of the settlement as it examined aspects of the case under Rule 23 criteria. See *id.,* at 630–634.

The Third Circuit recognized that Rule 23(a)(2)'s "commonality" requirement is subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class "predominate over" other questions. The court therefore trained its attention on the "predominance" inquiry. See *id.,* at 627. The harmfulness of asbestos exposure was indeed a prime factor common to the class, the Third Circuit observed. See *id.,* at 626, 630. But uncommon questions abounded.

In contrast to mass torts involving a single accident, class members in this case were exposed to different asbestos-containing products, in different ways, over different periods, and for different amounts of time; some suffered no physical injury, others suffered disabling or deadly diseases. See *id.,* at 626, 628. "These factual differences," the Third Circuit explained, "translate[d] into significant legal differences." *Id.,* at 627. State law governed and varied widely on such critical issues as "viability of [exposure-only] claims [and] availability of causes of action for medical monitoring, increased risk of cancer, and fear of future injury." *Ibid.*[14] "[T]he number of uncommon issues in this humongous class action," the Third Circuit concluded, *ibid.*, barred a determination, under existing tort law, that common questions predominated, see *id.*, at 630.

The Court of Appeals next found that "serious intra-class conflicts preclude[d] th[e] class from meeting the adequacy of representation requirement" of Rule 23(a)(4). *Ibid.* Adverting to, but not resolving charges of attorney conflict of interests, the Third Circuit addressed the question whether the named plaintiffs could adequately advance the interests of all class members. The Court of Appeals acknowledged that the District Court was certainly correct to this extent: "'[T]he members of the class are united in seeking the maximum possible recovery for their asbestos-related claims.'" *Ibid.* (quoting 157 F. R. D., at 317). "But the settlement does more than simply provide a general recovery fund," the Court of Appeals immediately added; "[r]ather, it makes important judgments on how recovery is to be *allocated* among different kinds of plaintiffs, decisions that necessarily favor some claimants over others." 83 F. 3d, at 630.

In the Third Circuit's view, the "most salient" divergence of interests separated plaintiffs already afflicted with an asbestos-related disease from plaintiffs without manifest injury (exposure-only plaintiffs). The latter would rationally want protection against inflation for distant recoveries. See *ibid.* They would also seek sturdy back-end opt-out rights and "causation provisions that can keep pace with changing science and medicine, rather than freezing in place the science of 1993." *Id.*, at 630–631. Already injured parties, in contrast, would care little about such provisions and would rationally trade them for higher current payouts. See *id.*, at 631. These and other adverse interests, the Court of Appeals carefully explained, strongly suggested that an undivided set of representatives could not adequately protect the discrete interests of both currently afflicted and exposure-only claimants.

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[14] Recoveries under the laws of different States spanned a wide range. Objectors assert, for example, that 15 percent of current mesothelioma claims arise in California, where the statewide average recovery is $419,674—or more than 209 percent above the $200,000 maximum specified in the settlement for mesothelioma claims not typed "extraordinary." See Brief for Respondents George Windsor et al. 5–6, n. 5 (citing 2 App. 461).

The Third Circuit next rejected the District Court's determination that the named plaintiffs were "typical" of the class, noting that this Rule 23(a)(3) inquiry overlaps the adequacy of representation question: "both look to the potential for conflicts in the class." *Id.*, at 632. Evident conflict problems, the court said, led it to hold that "no set of representatives can be 'typical' of this class." *Ibid.*

The Court of Appeals similarly rejected the District Court's assessment of the superiority of the class action. The Third Circuit initially noted that a class action so large and complex "could not be tried." *Ibid.* The court elaborated most particularly, however, on the unfairness of binding exposure-only plaintiffs who might be unaware of the class action or lack sufficient information about their exposure to make a reasoned decision whether to stay in or opt out. See *id.*, at 633. "A series of statewide or more narrowly defined adjudications, either through consolidation under Rule 42(a) or as class actions under Rule 23, would seem preferable," the Court of Appeals said. *Id.*, at 634.

The Third Circuit, after intensive review, ultimately ordered decertification of the class and vacation of the District Court's antisuit injunction. *Id.*, at 635. Judge Wellford concurred, "fully subscrib[ing] to the decision of Judge Becker that the plaintiffs in this case ha[d] not met the requirements of Rule 23." *Ibid.* He added that in his view, named exposure-only plaintiffs had no standing to pursue the suit in federal court, for their depositions showed that "[t]hey claimed no damages and no present injury." *Id.*, at 638.

We granted certiorari, 519 U. S. 957 (1996), and now affirm.

II

Objectors assert in this Court, as they did in the District Court and Court of Appeals, an array of jurisdictional barriers. Most fundamentally, they maintain that the settlement proceeding instituted by class counsel and CCR is not a justiciable case or controversy within the confines of Article III of the Federal Constitution. In the main, they say, the proceeding is a nonadversarial endeavor to impose on countless individuals without currently ripe claims an administrative compensation regime binding on those individuals if and when they manifest injuries.

Furthermore, objectors urge that exposure-only claimants lack standing to sue: Either they have not yet sustained any cognizable injury or, to the extent the complaint states claims and demands relief for emotional distress, enhanced risk of disease, and medical monitoring, the settlement provides no redress. Objectors also argue that exposure-only claimants did not meet the then-current amount-in-controversy requirement (in excess of $50,000) specified for federal-court jurisdiction based upon diversity of citizenship. See 28 U. S. C. § 1332(a).

As earlier recounted, see *supra*, at 608, the Third Circuit declined to reach these issues because they "would not exist but for the [class-action] certification." 83 F. 3d, at 623. We agree that "[t]he class certification issues are dispositive," *ibid.;* because their resolution here is logically antecedent to the existence of any Article III issues, it is appropriate to reach them first, cf. *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 66–67 (1997) (declining to resolve definitively question whether petitioners had standing because mootness issue was dispositive of the case). We therefore follow the path taken by the Court of Appeals, mindful that

Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure "shall not abridge, enlarge or modify any substantive right," 28 U. S. C. § 2072(b). See also Fed. Rule Civ. Proc. 82 ("rules shall not be construed to extend . . . the [subject-matter] jurisdiction of the United States district courts").[15]

III

To place this controversy in context, we briefly describe the characteristics of class actions for which the Federal Rules provide. Rule 23, governing federal-court class actions, stems from equity practice and gained its current shape in an innovative 1966 revision. See generally Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 375–400 (1967) (hereinafter Kaplan, Continuing Work). Rule 23(a) states four threshold requirements applicable to all class actions: (1) numerosity (a "class [so large] that joinder of all members is impracticable"); (2) commonality ("questions of law or fact common to the class"); (3) typicality (named parties' claims or defenses "are typical . . . of the class"); and (4) adequacy of representation (representatives "will fairly and adequately protect the interests of the class").

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[15] The opinion dissenting in part does not find the class-certification issues dispositive—at least not yet, and would return the case to the Third Circuit for a second look. See *post*, at 630–631, 641. If certification issues were genuinely in doubt, however, the jurisdictional issues would loom larger. Concerning objectors' assertions that exposure-only claimants do not satisfy the $50,000 amount-in-controversy and may have no currently ripe claim, see *Metro-North Commuter R. Co.* v. *Buckley, ante,* p. 424 (Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U. S. C. § 51 *et seq.,* interpreted in light of common-law principles, does not permit "exposure-only" railworker to recover for negligent infliction of emotional distress or lump-sum damages for costs of medical monitoring).

In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3). Rule 23(b)(1) covers cases in which separate actions by or against individual class members would risk establishing "incompatible standards of conduct for the party opposing the class," Fed. Rule Civ. Proc. 23(b)(1)(A), or would "as a practical matter be dispositive of the interests" of nonparty class members "or substantially impair or impede their ability to protect their interests," Rule 23(b)(1)(B). Rule 23(b)(1)(A) "takes in cases where the party is obliged by law to treat the members of the class alike (a utility acting toward customers; a government imposing a tax), or where the party must treat all alike as a matter of practical necessity (a riparian owner using water as against downriver owners)." Kaplan, Continuing Work 388 (footnotes omitted). Rule 23(b)(1)(B) includes, for example, "limited fund" cases, instances in which numerous persons make claims against a fund insufficient to satisfy all claims. See Advisory Committee's Notes on Fed. Rule Civ. Proc. 23, 28 U. S. C. App., pp. 696–697 (hereinafter Adv. Comm. Notes).

Rule 23(b)(2) permits class actions for declaratory or injunctive relief where "the party opposing the class has acted or refused to act on grounds generally applicable to the class." Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples. Adv. Comm. Notes, 28 U. S. C. App., p. 697; see Kaplan, Continuing Work 389 (subdivision (b)(2) "build[s] on experience mainly, but not exclusively, in the civil rights field").

In the 1966 class-action amendments, Rule 23(b)(3), the category at issue here, was "the most adventuresome" innovation. See Kaplan, A Prefatory Note, 10 B. C. Ind. & Com. L. Rev. 497, 497 (1969) (hereinafter Kaplan, Prefatory Note). Rule 23(b)(3) added to the complex-litigation arsenal class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be excluded. See 7A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1777, p. 517 (2d ed. 1986) (hereinafter Wright, Miller, & Kane); see generally Kaplan, Continuing Work 379–400. Rule 23(b)(3) "opt-out" class actions superseded the former "spurious" class action, so characterized because it generally functioned as a permissive joinder ("opt-in") device. See 7A Wright, Miller, & Kane § 1753, at 28–31, 42–44; see also Adv. Comm. Notes, 28 U. S. C. App., p. 695.

Framed for situations in which "class-action treatment is not as clearly called for" as it is in Rule 23(b)(1) and (b)(2) situations, Rule 23(b)(3) permits certification where class suit "may nevertheless be convenient and desirable." Adv. Comm. Notes, 28 U. S. C. App., p. 697. To qualify for certification under Rule 23(b)(3), a class must meet two requirements beyond the Rule 23(a) prerequisites: Common questions must "predominate over any questions affecting only individual members"; and class resolution must be "superior to other available methods for the fair and efficient adjudication of the controversy." In adding "predominance" and "superiority" to the qualification-for-certification list, the Advisory Committee sought to cover cases "in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Ibid.* Sensitive to the competing tugs of individual autonomy for those who might prefer to go it alone or in a smaller unit, on the one hand, and systemic efficiency on the other, the Reporter for the 1966 amendments cautioned: "The new provision invites a close look at the case before it is accepted as a class action . . . ." Kaplan, Continuing Work 390.

Rule 23(b)(3) includes a nonexhaustive list of factors pertinent to a court's "close look" at the predominance and superiority criteria:

> "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

In setting out these factors, the Advisory Committee for the 1966 reform anticipated that in each case, courts would "consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit." Adv. Comm. Notes, 28 U. S. C. App., p. 698. They elaborated:

> "The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical; the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable." *Ibid.*

See also Kaplan, Continuing Work 391 ("Th[e] interest [in individual control] can be high where the stake of each member bulks large and his will and ability to take care of himself are strong; the interest may be no more than theoretic where the individual stake is so small as to make a separate action impracticable." (footnote omitted)). As the Third Circuit observed in the instant case: "Each plaintiff [in an action involving claims for personal injury and death] has a significant interest in individually controlling the prosecution of [his case]"; each "ha[s] a substantial stake in making individual decisions on whether and when to settle." 83 F. 3d, at 633.

While the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." Kaplan, Prefatory Note 497. As concisely recalled in a recent Seventh Circuit opinion:

> "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Mace* v. *Van Ru Credit Corp.*, 109 F. 3d 338, 344 (1997).

To alert class members to their right to "opt out" of a (b)(3) class, Rule 23 instructs the court to "direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. Rule Civ. Proc. 23(c)(2); see *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156, 173–177 (1974) (individual notice to class members identifiable through reasonable effort is mandatory in (b)(3) actions; requirement may not be relaxed based on high cost).

No class action may be "dismissed or compromised without [court] approval," preceded by notice to class members. Fed. Rule Civ. Proc. 23(e). The Advisory Committee's sole comment on this terse final provision of Rule 23 restates the Rule's instruction without elaboration: "Subdivision (e) requires approval of the court, after notice, for the dismissal or compromise of any class action." Adv. Comm. Notes, 28 U. S. C. App., p. 699.

In the decades since the 1966 revision of Rule 23, class-action practice has become ever more "adventuresome" as a means of coping with claims too numerous to secure their "just, speedy, and inexpensive determination" one by one. See Fed. Rule Civ. Proc. 1. The development reflects concerns about the efficient use of court resources and the conservation of funds to compensate claimants who do not line up early in a litigation queue. See generally J. Weinstein, Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations, and Other Multiparty Devices (1995); Schwarzer, Settlement of Mass Tort Class Actions: Order out of Chaos, 80 Cornell L. Rev. 837 (1995).

Among current applications of Rule 23(b)(3), the "settlement only" class has become a stock device. See, *e. g.,* T. Willging, L. Hooper, & R. Niemic, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 61–62 (1996) (noting large number of such cases in districts studied). Although all Federal Circuits recognize the utility of Rule 23(b)(3) settlement classes, courts have divided on the extent to which a proffered settlement affects court surveillance under Rule 23's certification criteria.

In *GM Trucks,* 55 F. 3d, at 799–800, and in the instant case, 83 F. 3d, at 624–626, the Third Circuit held that a class cannot be certified for settlement when certification for trial would be unwarranted. Other courts have held that settlement obviates or reduces the need to measure a proposed class against the enumerated Rule 23 requirements. See, *e. g., In re Asbestos Litigation,* 90 F. 3d, at 975 (CA5) ("in settlement class context, common issues arise from the settlement itself") (citing H. Newberg & A. Conte, 2 Newberg on Class Actions § 11.28, p. 11–58 (3d ed. 1992)); *White* v. *National Football League,* 41 F. 3d 402, 408 (CA8 1994) ("adequacy of class representation . . . is ultimately determined by the settlement itself"), cert. denied, 515 U. S. 1137 (1995); *In re A. H. Robins Co.,* 880 F. 2d 709, 740 (CA4) ("[i]f not a ground for certification *per se,* certainly settlement should be a factor, and an important factor, to be considered when determining certification"), cert. denied *sub nom. Anderson*

v. *Aetna Casualty & Surety Co.*, 493 U. S. 959 (1989); *Malchman* v. *Davis*, 761 F. 2d 893, 900 (CA2 1985) (certification appropriate, in part, because "the interests of the members of the broadened class in the settlement agreement were commonly held"), cert. denied, 475 U. S. 1143 (1986).

A proposed amendment to Rule 23 would expressly authorize settlement class certification, in conjunction with a motion by the settling parties for Rule 23(b)(3) certification, "even though the requirements of subdivision (b)(3) might not be met for purposes of trial." Proposed Amendment to Fed. Rule Civ. Proc. 23(b), 117 S. Ct. No. 1 CXIX, CLIV to CLV (Aug. 1996) (Request for Comment). In response to the publication of this proposal, voluminous public comments—many of them opposed to, or skeptical of, the amendment—were received by the Judicial Conference Standing Committee on Rules of Practice and Procedure. See, *e. g.*, Letter from Steering Committee to Oppose Proposed Rule 23, signed by 129 law professors (May 28, 1996); Letter from Paul D. Carrington (May 21, 1996). The Committee has not yet acted on the matter. We consider the certification at issue under the Rule as it is currently framed.

IV

We granted review to decide the role settlement may play, under existing Rule 23, in determining the propriety of class certification. The Third Circuit's opinion stated that each of the requirements of Rule 23(a) and (b)(3) "must be satisfied without taking into account the settlement." 83 F. 3d, at 626 (quoting *GM Trucks*, 55 F. 3d, at 799). That statement, petitioners urge, is incorrect.

We agree with petitioners to this limited extent: Settlement is relevant to a class certification. The Third Circuit's opinion bears modification in that respect. But, as we earlier observed, see *supra*, at 609, the Court of Appeals in fact did not ignore the settlement; instead, that court homed in on settlement terms in explaining why it found the absentees' interests inadequately represented. See 83 F. 3d, at 630–631. The Third Circuit's close inspection of the settlement in that regard was altogether proper.

Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial. But other specifications of the Rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context. Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold. See Rule 23(c), (d).[16]

And, of overriding importance, courts must be mindful that the Rule as now composed sets the requirements they are bound to enforce. Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress. See 28 U. S. C. §§2073, 2074. The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure "shall not abridge . . . any substantive right." §2072(b).

Rule 23(e), on settlement of class actions, reads in its entirety: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." This prescription was designed to function as an additional requirement, not a superseding direction, for the "class action" to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b). Cf. *Eisen,* 417 U. S., at 176–177 (adequate representation does not eliminate additional requirement to provide notice). Subdivisions (a) and (b) focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives. That dominant concern persists when settlement, rather than trial, is proposed.

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[16] Portions of the opinion dissenting in part appear to assume that settlement counts only one way—in favor of certification. See *post*, at 629, 630, 641. But see *post*, at 635. To the extent that is the dissent's meaning, we disagree. Settlement, though a relevant factor, does not inevitably signal that class-action certification should be granted more readily than it would be were the case to be litigated. For reasons the Third Circuit aired, see 83 F. 3d 610, 626–635 (1996), proposed settlement classes sometimes warrant more, not less, caution on the question of certification.

The safeguards provided by the Rule 23(a) and (b) class-qualifying criteria, we emphasize, are not impractical impediments—checks shorn of utility—in the settlement-class context. First, the standards set for the protection of absent class members serve to inhibit appraisals of the chancellor's foot kind—class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness.

Second, if a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b), and permitting class designation despite the impossibility of litigation, both class counsel and court would be disarmed. Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer, see Coffee, Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343, 1379–1380 (1995), and the court would face a bargain proffered for its approval without benefit of adversarial investigation, see, *e. g., Kamilewicz* v. *Bank of Boston Corp.,* 100 F. 3d 1348, 1352 (CA7 1996) (Easterbrook, J., dissenting from denial of rehearing en banc) (parties "may even put one over on the court, in a staged performance"), cert. denied, 520 U. S. 1204 (1997).

Federal courts, in any case, lack authority to substitute for Rule 23's certification criteria a standard never adopted—that if a settlement is "fair," then certification is proper. Applying to this case criteria the rulemakers set, we conclude that the Third Circuit's appraisal is essentially correct. Although that court should have acknowledged that settlement is a factor in the calculus, a remand is not warranted on that account. The Court of Appeals' opinion amply demonstrates why—with or without a settlement on the table—the sprawling class the District Court certified does not satisfy Rule 23's requirements.[17]

A

We address first the requirement of Rule 23(b)(3) that "[common] questions of law or fact . . . predominate over any questions affecting only individual members." The District Court concluded that predominance was satisfied based on two factors: class members' shared experience of asbestos exposure and their common "interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system." 157 F. R. D., at 316. The settling parties also contend that the settlement's fairness is a common question, predominating over disparate legal issues that might be pivotal in litigation but become irrelevant under the settlement.

The predominance requirement stated in Rule 23(b)(3), we hold, is not met by the factors on which the District Court relied. The benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration, see *supra*, at 598, but it is not pertinent to the predominance inquiry. That inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement.[18]

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[17] We do not inspect and set aside for insufficient evidence District Court findings of fact. Cf. *post*, at 633, 637–638. Rather, we focus on the requirements of Rule 23, and endeavor to explain why those requirements cannot be met for a class so enormously diverse and problematic as the one the District Court certified.

The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. See 7A Wright, Miller, & Kane 518–519.[19] The inquiry appropriate under Rule 23(e), on the other hand, protects unnamed class members "from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise." See 7B Wright, Miller, & Kane § 1797, at 340–341. But it is not the mission of Rule 23(e) to assure the class cohesion that legitimizes representative action in the first place. If a common interest in a fair compromise could satisfy the predominance requirement of Rule 23(b)(3), that vital prescription would be stripped of any meaning in the settlement context.

The District Court also relied upon this commonality: "The members of the class have all been exposed to asbestos products supplied by the defendants . . . ." 157 F. R. D., at 316. Even if Rule 23(a)'s commonality requirement may be satisfied by that shared experience, the predominance criterion is far more demanding. See 83 F. 3d, at 626–627. Given the greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions, any overarching dispute about the health consequences of asbestos exposure cannot satisfy the Rule 23(b)(3) predominance standard.

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[18] In this respect, the predominance requirement of Rule 23(b)(3) is similar to the requirement of Rule 23(a)(3) that "claims or defenses" of the named representatives must be "typical of the claims or defenses of the class." The words "claims or defenses" in this context—just as in the context of Rule 24(b)(2) governing permissive intervention—"manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit." *Diamond* v. *Charles*, 476 U. S. 54, 76–77 (1986) (O'CONNOR, J., concurring in part and concurring in judgment).

[19] This case, we note, involves no "limited fund" capable of supporting class treatment under Rule 23(b)(1)(B), which does not have a predominance requirement. See *Georgine* v. *Amchem Products, Inc.*, 157 F. R. D. 246, 318 (ED Pa. 1994); see also *id.*, at 291, and n. 40. The settling parties sought to proceed exclusively under Rule 23(b)(3).

The Third Circuit highlighted the disparate questions undermining class cohesion in this case:

> "Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma .... Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.
>
> "The [exposure-only] plaintiffs especially share little in common, either with each other or with the presently injured class members. It is unclear whether they will contract asbestos-related disease and, if so, what disease each will suffer. They will also incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories." *Id.*, at 626.

Differences in state law, the Court of Appeals observed, compound these disparities. See *id.*, at 627 (citing *Phillips Petroleum Co.* v. *Shutts*, 472 U. S. 797, 823 (1985)).

No settlement class called to our attention is as sprawling as this one. Cf. *In re Asbestos Litigation*, 90 F. 3d, at 976, n. 8 ("We would likely agree with the Third Circuit that a class action requesting individual damages for members of a global class of asbestos claimants would not satisfy [Rule 23] requirements due to the huge number of individuals and their varying medical expenses, smoking histories, and family situations."). Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws. See Adv. Comm. Notes, 28 U. S. C. App., p. 697; see also *supra*, at 615, 616. Even mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement. The Advisory Committee for the 1966 revision of Rule 23, it is true, noted that "mass accident" cases are likely to present "significant questions, not only of damages but of liability and defenses of liability, . . . affecting the individuals in different ways." Adv. Comm. Notes, 28 U. S. C. App., p. 697. And the Committee advised that such cases are "ordinarily not appropriate" for class treatment. *Ibid.* But the text of the Rule does not categorically exclude mass tort cases from class certification, and District Courts, since the late 1970's, have been certifying such cases in increasing number. See Resnik, From "Cases" to "Litigation," 54 Law & Contemp. Prob. 5, 17–19 (Summer 1991) (describing trend). The Committee's warning, however, continues to call for caution when individual stakes are high and disparities among class members great. As the Third Circuit's opinion makes plain, the certification in this case does not follow the counsel of caution. That certification cannot be upheld, for it rests on a conception of Rule 23(b)(3)'s predominance requirement irreconcilable with the Rule's design.

B

Nor can the class approved by the District Court satisfy Rule 23(a)(4)'s requirement that the named parties "will fairly and adequately protect the interests of the class." The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. See *General Telephone Co. of Southwest* v. *Falcon*, 457 U. S. 147, 157–158, n. 13 (1982). "[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *East Tex. Motor Freight System, Inc.* v. *Rodriguez,* 431 U. S. 395, 403 (1977) (quoting *Schlesinger* v. *Reservists Comm. to Stop the War,* 418 U. S. 208, 216 (1974)).[20]

As the Third Circuit pointed out, named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future. Cf. *General Telephone Co. of Northwest* v. *EEOC,* 446 U. S. 318, 331 (1980) ("In employment discrimination litigation, conflicts might arise, for example, between employees and applicants who were denied employment and who will, if granted relief, compete with employees for fringe benefits or seniority. Under Rule 23, the same plaintiff could not represent these classes.").

The disparity between the currently injured and exposure-only categories of plaintiffs, and the diversity within each category are not made insignificant by the District Court's finding that petitioners' assets suffice to pay claims under the settlement. See 157 F. R. D., at 291. Although this is not a "limited fund" case certified under Rule 23(b)(1)(B), the terms of the settlement reflect essential allocation decisions designed to confine compensation and to limit defendants' liability. For example, as earlier described, see *supra*, at 604–605, the settlement includes no adjustment for inflation; only a few claimants per year can opt out at the back end; and loss-of-consortium claims are extinguished with no compensation.

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[20] The adequacy-of-representation requirement "tend[s] to merge" with the commonality and typicality criteria of Rule 23(a), which "serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *General Telephone Co. of Southwest* v. *Falcon,* 457 U. S. 147, 157, n. 13 (1982). The adequacy heading also factors in competency and conflicts of class counsel. See *id.,* at 157–158, n. 13. Like the Third Circuit, we decline to address adequacy-of-counsel issues discretely in light of our conclusions that common questions of law or fact do not predominate and that the named plaintiffs cannot adequately represent the interests of this enormous class.

The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. Although the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency. In another asbestos class action, the Second Circuit spoke precisely to this point:

> "[W]here differences among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement without creating subclasses on the basis of consents by members of a unitary class, some of whom happen to be members of the distinct subgroups. The class representatives may well have thought that the Settlement serves the aggregate interests of the entire class. But the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups." *In re Joint Eastern and Southern Dist. Asbestos Litigation*, 982 F. 2d 721, 742–743 (1992), modified on reh'g *sub nom. In re Findley*, 993 F. 2d 7 (1993).

The Third Circuit found no assurance here—either in the terms of the settlement or in the structure of the negotiations—that the named plaintiffs operated under a proper understanding of their representational responsibilities. See

83 F. 3d, at 630–631. That assessment, we conclude, is on the mark.

C

Impediments to the provision of adequate notice, the Third Circuit emphasized, rendered highly problematic any endeavor to tie to a settlement class persons with no perceptible asbestos-related disease at the time of the settlement. *Id.*, at 633; cf. *In re Asbestos Litigation*, 90 F. 3d, at 999–1000 (Smith, J., dissenting). Many persons in the exposure-only category, the Court of Appeals stressed, may not even know of their exposure, or realize the extent of the harm they may incur. Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out.

Family members of asbestos-exposed individuals may themselves fall prey to disease or may ultimately have ripe claims for loss of consortium. Yet large numbers of people in this category—future spouses and children of asbestos victims—could not be alerted to their class membership. And current spouses and children of the occupationally exposed may know nothing of that exposure.

Because we have concluded that the class in this case cannot satisfy the requirements of common issue predominance and adequacy of representation, we need not rule, definitively, on the notice given here. In accord with the Third Circuit, however, see 83 F. 3d, at 633–634, we recognize the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous.

V

The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure.[21] Congress, however, has not adopted such a solution. And Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load CCR, class counsel, and the District Court heaped upon it. As this case exemplifies, the rulemakers' prescriptions for class actions may be endangered by "those who embrace [Rule 23] too enthusiastically just as [they are by] those who approach [the Rule] with distaste." C. Wright, Law of Federal Courts 508 (5th ed. 1994); cf. 83 F. 3d, at 634 (suggesting resort to less bold aggregation techniques, including more narrowly defined class certifications).

* * *

For the reasons stated, the judgment of the Court of Appeals for the Third Circuit is

Affirmed.

JUSTICE O'CONNOR took no part in the consideration or decision of this case.

JUSTICE BREYER, with whom JUSTICE STEVENS joins, concurring in part and dissenting in part.

Although I agree with the Court's basic holding that "[s]ettlement is relevant to a class certification," *ante*, at 619, I find several problems in its approach that lead me to a different conclusion. First, I believe that the need for settlement in this mass tort case, with hundreds of thousands of lawsuits, is greater than the Court's opinion suggests. Second, I would give more weight than would the majority to settlement-related issues for purposes of determining whether common issues predominate. Third, I am uncertain about the Court's determination of adequacy of representation, and do not believe it appropriate for this Court to second-guess the District Court on the matter without first having the Court of Appeals consider it. Fourth, I am uncertain about the tenor of an opinion that seems to suggest the settlement is unfair. And fifth, in the absence of further review by the Court of Appeals, I cannot accept the majority's suggestions that "notice" is inadequate.

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[21] The opinion dissenting in part is a forceful statement of that argument.

These difficulties flow from the majority's review of what are highly fact-based, complex, and difficult matters, matters that are inappropriate for initial review before this Court. The law gives broad leeway to district courts in making class certification decisions, and their judgments are to be reviewed by the court of appeals only for abuse of discretion. See *Califano* v. *Yamasaki,* 442 U. S. 682, 703 (1979). Indeed, the District Court's certification decision rests upon more than 300 findings of fact reached after five weeks of comprehensive hearings. Accordingly, I do not believe that we should in effect set aside the findings of the District Court. That court is far more familiar with the issues and litigants than is a court of appeals or are we, and therefore has "broad power and discretion . . . with respect to matters involving the certification" of class actions. *Reiter* v. *Sonotone Corp.,* 442 U. S. 330, 345 (1979); cf. *Cooter & Gell* v. *Hartmarx Corp.,* 496 U. S. 384, 402 (1990) (district court better situated to make fact-dependent legal determinations in Rule 11 context).

I do not believe that we can rely upon the Court of Appeals' review of the District Court record, for that review, and its ultimate conclusions, are infected by a legal error. *E. g., Georgine* v. *Amchem Products, Inc.,* 83 F. 3d 610, 626 (CA3 1996) (holding that "*considered as a litigation class,*" the class cannot meet Federal Rule of Civil Procedure 23's requirements (emphasis added)). There is no evidence that the Court of Appeals at any point considered the settlement as something that would help the class meet Rule 23. I find, moreover, the fact-related issues presented here sufficiently close to warrant further detailed appellate court review under the correct legal standard. Cf. *Reno* v. *Bossier Parish School Bd.*, 520 U. S. 471, 486 (1997). And I shall briefly explain why this is so.

I

First, I believe the majority understates the importance of settlement in this case. Between 13 and 21 million workers have been exposed to asbestos in the workplace—over the past 40 or 50 years—but the most severe instances of such exposure probably occurred three or four decades ago. See Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation, pp. 6–7 (Mar. 1991) (Judicial Conference Report); App. 781–782, 801; B. Castleman, Asbestos: Medical and Legal Aspects 787–788 (4th ed. 1996). This exposure has led to several hundred thousand lawsuits, about 15% of which involved claims for cancer and about 30% for asbestosis. See *In re Joint Eastern and Southern Dist. Asbestos Litigation*, 129 B. R. 710, 936–937 (E and SD N. Y. 1991). About half of the suits have involved claims for pleural thickening and plaques—the harmfulness of which is apparently controversial. (One expert below testified that they "don't transform into cancer" and are not "predictor[s] of future disease," App. 781.) Some of those who suffer from the most serious injuries, however, have received little or no compensation. *In re School Asbestos Litigation*, 789 F. 2d 996, 1000 (CA3 1986); see also Edley & Weiler, Asbestos: A Multi-Billion-Dollar Crisis, 30 Harv. J. Legis. 383, 384, 393 (1993) ("[U]p to one-half of asbestos claims are now being filed by people who have little or no physical impairment. Many of these claims produce substantial payments (and substantial costs) even though the individual litigants will never become impaired"). These lawsuits have taken up more than 6% of all federal civil filings in one recent year, and are subject to a delay that is twice that of other civil suits. Judicial Conference Report 7, 10–11.

Delays, high costs, and a random pattern of noncompensation led the Judicial Conference Ad Hoc Committee on Asbestos Litigation to transfer all federal asbestos personal-injury cases to the Eastern District of Pennsylvania in an effort to bring about a fair and comprehensive settlement. It is worth considering a few of the Committee's comments. See Judicial Conference Report 2 ("'Decisions concerning thousands of deaths, millions of injuries, and billions of dollars are entangled in a litigation system whose strengths have increasingly been overshadowed by its weaknesses.' The ensuing five years have seen the picture worsen: increased filings, larger backlogs, higher costs, more bankruptcies and poorer prospects that judgments—if ever obtained—can be collected" (quoting Rand Corporation Institute for Civil Justice)); *id.*, at 13 ("The transaction costs associated with asbestos litigation are an unconscionable burden on the victims of asbestos disease." "[O]f each asbestos litigation dollar, 61 cents is consumed in transaction costs .... Only 39 cents were paid to the asbestos victims" (citing Rand finding)); *id.*, at 12 ("Delays also can increase transaction costs, especially the attorneys' fees paid by defendants at hourly rates. These costs reduce either the insurance fund or the company's assets, thereby reducing the funds available to pay pending and future claimants. By the end of the trial phase in [one case], at least seven defendants had declared bankruptcy (as a result of asbestos claims generally")); see also J. Weinstein, Individual Justice in Mass Tort Litigation 155 (1995); Edley & Weiler, *supra,* at 389–395.

Although the transfer of the federal asbestos cases did not produce a general settlement, it was intertwined with and led to a lengthy year-long negotiation between the cochairs of the Plaintiff's Multi-District Litigation Steering Committee (elected by the Plaintiff's Committee Members and approved by the District Court) and the 20 asbestos defendants who are before us here. *Georgine* v. *Amchem Products, Inc.,* 157 F. R. D. 246, 266–267 (ED Pa. 1994); App. 660–662.

These "protracted and vigorous" negotiations led to the present partial settlement, which will pay an estimated $1.3 billion and compensate perhaps 100,000 class members in the first 10 years. 157 F. R. D., at 268, 287. "The negotiations included a substantial exchange of information" between class counsel and the 20 defendant companies, including "confidential data" showing the defendants' historical settlement averages, numbers of claims filed and settled, and insurance resources. *Id.*, at 267. "Virtually no provision" of the settlement "was not the subject of significant negotiation," and the settlement terms "changed substantially" during the negotiations. *Ibid.* In the end, the negotiations produced a settlement that, the District Court determined based on its detailed review of the process, was "the result of arms-length adversarial negotiations by extraordinarily competent and experienced attorneys." *Id.*, at 335.

The District Court, when approving the settlement, concluded that it improved the plaintiffs' chances of compensation and reduced total legal fees and other transaction costs by a significant amount. Under the previous system, according to the court, "[t]he sickest of victims often go uncompensated for years while valuable funds go to others who remain unimpaired by their mild asbestos disease." *Ibid.* The court believed the settlement would create a compensation system that would make more money available for plaintiffs who later develop serious illnesses.

I mention this matter because it suggests that the settlement before us is unusual in terms of its importance, both to many potential plaintiffs and to defendants, and with respect to the time, effort, and expenditure that it reflects. All of which leads me to be reluctant to set aside the District Court's findings without more assurance than I have that they are wrong. I cannot obtain that assurance through comprehensive review of the record because that is properly the job of the Court of Appeals and that court, understandably, but as we now hold, mistakenly, believed that settlement was not a relevant (and, as I would say, important) consideration.

Second, the majority, in reviewing the District Court's determination that common "issues of fact and law predominate," says that the predominance "inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement." *Ante*, at 623 (footnote omitted). I find it difficult to interpret this sentence in a way that could lead me to the majority's conclusion. If the majority means that these presettlement questions are what matters, then how does it reconcile its statement with its basic conclusion that "settlement is relevant" to class certification, or with the numerous lower court authority that says that settlement is not only relevant, but important? See, *e. g., In re A. H. Robins Co.*, 880 F. 2d 709, 740 (CA4), cert. denied *sub nom. Anderson* v. *Aetna Casualty & Surety Co.*, 493 U. S. 959 (1989); *In re Beef Industry Antitrust Litigation*, 607 F. 2d 167, 177–178 (CA5 1979), cert. denied *sub nom. Iowa Beef Processors, Inc.* v. *Meat Price Investigators Assn.*, 452 U. S. 905 (1981); 2 H. Newberg & A. Conte, Newberg on Class Actions § 11.27, pp. 11–54 to 11–55 (3d ed. 1992).

Nor do I understand how one could decide whether common questions "predominate" in the abstract—without looking at what is likely to be at issue in the proceedings that will ensue, namely, the settlement. Every group of human beings, after all, has some features in common, and some that differ. How can a court make a contextual judgment of the sort that Rule 23 requires without looking to what proceedings will follow? Such guideposts help it decide whether, in light of common concerns and differences, certification will achieve Rule 23's basic objective—"economies of time, effort, and expense." Advisory Committee's Notes on Fed. Rule Civ. Proc. 23(b)(3), 28 U. S. C. App., p. 697. As this Court has previously observed, "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *General Telephone Co. of Southwest* v. *Falcon,* 457 U. S. 147, 160 (1982); see also 7B C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1785, p. 107, and n. 34 (1986). I am not saying that the "settlement counts only one way." *Ante,* at 620, n. 16. Rather, the settlement may simply "add a great deal of information to the court's inquiry and will often expose diverging interests or common issues that were not evident or clear from the complaint" and courts "can and should" look to it to enhance the "ability . . . to make informed certification decisions." *In re Asbestos Litigation,* 90 F. 3d 963, 975 (CA5 1996).

The majority may mean that the District Court gave too much weight to the settlement. But I am not certain how it can reach that conclusion. It cannot rely upon the Court of Appeals, for that court gave no positive weight at all to the settlement. Nor can it say that the District Court relied solely on "a common interest in a fair compromise," *ante,* at 623, for the District Court did not do so. Rather, it found the settlement relevant because it explained the importance of the class plaintiffs' common features and common interests. The court found predominance in part because:

> "The members of the class have all been exposed to asbestos products supplied by the defendants and all share an interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system." 157 F. R. D., at 316.

The settlement is relevant because it means that these common features and interests are likely to be important in the proceeding that would ensue—a proceeding that would focus primarily upon whether or not the proposed settlement fairly and properly satisfied the interests class members had in common. That is to say, the settlement underscored the importance of (a) the common fact of exposure, (b) the common interest in receiving *some* compensation for certain rather than running a strong risk of *no* compensation, and (c) the common interest in avoiding large legal fees, other transaction costs, and delays. *Ibid.*

Of course, as the majority points out, there are also important differences among class members. Different plaintiffs were exposed to different products for different times; each has a distinct medical history and a different history of smoking; and many cases arise under the laws of different States. The relevant question, however, is *how much* these differences matter in respect to the legal proceedings that lie ahead. Many, if not all, toxic tort class actions involve plaintiffs with such differences. And the differences in state law are of diminished importance in respect to a proposed settlement in which the defendants have waived all defenses and agreed to compensate all those who were injured. *Id.*, at 292.

These differences might warrant subclasses, though subclasses can have problems of their own. "There can be a cost in creating more distinct subgroups, each with its own representation. . . . [T]he more subclasses created, the more severe conflicts bubble to the surface and inhibit settlement. . . . The resources of defendants and, ultimately, the community must not be exhausted by protracted litigation." Weinstein, Individual Justice in Mass Tort Litigation, at 66. Or these differences may be too serious to permit an effort at group settlement. This kind of determination, as I have said, is one that the law commits to the discretion of the district court—reviewable for abuse of discretion by a court of appeals. I believe that we are far too distant from the litigation itself to reweigh the fact-specific Rule 23 determinations and to find them erroneous without the benefit of the Court of Appeals first having restudied the matter with today's legal standard in mind.

Third, the majority concludes that the "representative parties" will not "fairly and adequately protect the interests of the class." Rule 23(a)(4). It finds a serious conflict between plaintiffs who are now injured and those who may be injured in the future because "for the currently injured, the critical goal is generous immediate payments," a goal that "tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future." *Ante*, at 626.

I agree that there is a serious problem, but it is a problem that often exists in toxic tort cases. See Weinstein, *supra*, at 64 (noting that conflict "between present and future claimants" "is almost always present in some form in mass tort cases because long latency periods are needed to discover injuries"); see also Judicial Conference Report 34–35 ("Because many of the defendants in these cases have limited assets that may be called upon to satisfy the judgments obtained under current common tort rules and remedies, there is a 'real and present danger that the available assets will be exhausted before those later victims can seek compensation to which they are entitled'" (citation omitted)). And it is a problem that potentially exists whenever a single defendant injures several plaintiffs, for a settling plaintiff leaves fewer assets available for the others. With class actions, at least, plaintiffs have the consolation that a district court, thoroughly familiar with the facts, is charged with the responsibility of ensuring that the interests of no class members are sacrificed.

But this Court cannot easily safeguard such interests through review of a cold record. "What constitutes adequate representation is a question of fact that depends on the circumstances of each case." 7A Wright, Miller, & Kane, Federal Practice and Procedure § 1765, at 271. That is particularly so when, as here, there is an unusual baseline, namely, the "'real and present danger'" described by the Judicial Conference Report above. The majority's use of the lack of an inflation adjustment as evidence of inadequacy of representation for future plaintiffs, *ante,* at 626–627, is one example of this difficulty. An inflation adjustment might not be as valuable as the majority assumes if most plaintiffs are old and not worried about receiving compensation decades from now. There are, of course, strong arguments as to its value. But that disagreement is one that this Court is poorly situated to resolve.

Further, certain details of the settlement that are not discussed in the majority opinion suggest that the settlement may be of greater benefit to future plaintiffs than the majority suggests. The District Court concluded that future plaintiffs receive a "significant value" from the settlement due to a variety of its items that benefit future plaintiffs, such as: (1) tolling the statute of limitations so that class members "will no longer be forced to file premature lawsuits or risk their claims being time-barred"; (2) waiver of defenses to liability; (3) payment of claims, if and when members become sick, pursuant to the settlement's compensation standards, which avoids "the uncertainties, long delays and high transaction costs [including attorney's fees] of the tort system"; (4) "some assurance that there will be funds available if and when they get sick," based on the finding that each defendant "has shown an ability to fund the payment of all qualifying claims" under the settlement; and (5) the right to additional compensation if cancer develops (many settlements for plaintiffs with noncancerous conditions bar such additional claims). 157 F. R. D., at 292. For these reasons, and others, the District Court found that the distinction between present and future plaintiffs was "illusory." *Id.,* at 317–318.

I do not know whether or not the benefits are more or less valuable than an inflation adjustment. But I can certainly recognize an argument that they are. (To choose one more brief illustration, the majority chastises the settlement for extinguishing loss-of-consortium claims, *ante,* at 627, 628, but does not note that, as the District Court found, the "defendants' historical [settlement] averages, upon which the compensation values are based, include payments for loss of consortium claims, and, accordingly, the Compensation Schedule is not unfair for this ascribed reason," 157 F. R. D., at 278.) The difficulties inherent in both knowing and understanding the vast number of relevant individual fact-based determinations here counsel heavily in favor of deference to district court decisionmaking in Rule 23 decisions. Or, at the least, making certain that appellate court review has taken place with the correct standard in mind.

Fourth, I am more agnostic than is the majority about the basic fairness of the settlement. *Ante*, at 625–628. The District Court's conclusions rested upon complicated factual findings that are not easily cast aside. It is helpful to consider some of them, such as its determination that the settlement provided "fair compensation . . . while reducing the delays and transaction costs endemic to the asbestos litigation process" and that "the proposed class action settlement is superior to other available methods for the fair and efficient resolution of the asbestos-related personal injury claims of class members." 157 F. R. D., at 316 (citation omitted); see also *id.*, at 335 ("The inadequate tort system has demonstrated that the lawyers are well paid for their services but the victims are not receiving speedy and reasonably inexpensive resolution of their claims. Rather, the victims' recoveries are delayed, excessively reduced by transaction costs and relegated to the impersonal group trials and mass consolidations. The sickest of victims often go uncompensated for years while valuable funds go to others who remain unimpaired by their mild asbestos disease. Indeed, these unimpaired victims have, in many states, been forced to assert their claims prematurely or risk giving up all rights to future compensation for any future lung cancer or mesothelioma. The plan which this Court approves today will correct that unfair result for the class members and the . . . defendants"); *id.*, at 279, 280 (settlement "will result in less delay for asbestos claimants than that experienced in the present tort system" and will "result in the CCR defendants paying more claims at a faster rate, than they have ever paid before"); *id.*, at 292; Edley & Weiler, 30 Harv. J. Legis., at 405, 407 (finding that "[t]here are several reasons to believe that this settlement secures important gains for both sides" and that they "firmly endorse the fairness and adequacy of this settlement"). Indeed, the settlement has been endorsed as fair and reasonable by the AFL–CIO (and its Building and Construction Trades Department), which represents a " 'substantial percentage' " of class members, 157 F. R. D., at 325, and which has a role in monitoring implementation of the settlement, *id.*, at 285. I do not intend to pass judgment upon the settlement's fairness, but I do believe that these matters would have to be explored in far greater depth before I could reach a conclusion about fairness. And that task, as I have said, is one for the Court of Appeals.

Finally, I believe it is up to the District Court, rather than this Court, to review the legal sufficiency of notice to members of the class. The District Court found that the plan to provide notice was implemented at a cost of millions of dollars and included hundreds of thousands of individual notices, a wide-ranging television and print campaign, and significant additional efforts by 35 international and national unions to notify their members. *Id.*, at 312–313, 336. Every notice emphasized that an individual did not currently have to be sick to be a class member. And in the end, the District Court was "confident" that Rule 23 and due process requirements were satisfied because, as a result of this "extensive and expensive notice procedure," "over six million" individuals "received actual notice materials," and "millions more" were reached by the media campaign. *Id.*, at 312, 333, 336. Although the majority, in principle, is reviewing a Court of Appeals' conclusion, it seems to me that its opinion might call into question the fact-related determinations of the District

Court. *Ante*, at 628. To the extent that it does so, I disagree, for such findings cannot be so quickly disregarded. And I do not think that our precedents permit this Court to do so. See *Reiter*, 442 U. S., at 345; *Yamasaki*, 442 U. S., at 703.

II

The issues in this case are complicated and difficult. The District Court might have been correct. Or not. Subclasses might be appropriate. Or not. I cannot tell. And I do not believe that this Court should be in the business of trying to make these fact-based determinations. That is a job suited to the district courts in the first instance, and the courts of appeals on review. But there is no reason in this case to believe that the Court of Appeals conducted its prior review with an understanding that the settlement could have constituted a reasonably strong factor in favor of class certification. For this reason, I would provide the courts below with an opportunity to analyze the factual questions involved in certification by vacating the judgment, and remanding the case for further proceedings.

UNITED STATES *v.* O'HAGAN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 96–842. Argued April 16, 1997—Decided June 25, 1997

After Grand Metropolitan PLC (Grand Met) retained the law firm of Dorsey & Whitney to represent it regarding a potential tender offer for the Pillsbury Company's common stock, respondent O'Hagan, a Dorsey & Whitney partner who did no work on the representation, began purchasing call options for Pillsbury stock, as well as shares of the stock. Following Dorsey & Whitney's withdrawal from the representation, Grand Met publicly announced its tender offer, the price of Pillsbury stock rose dramatically, and O'Hagan sold his call options and stock at a profit of more than $4.3 million. A Securities and Exchange Commission (SEC) investigation culminated in a 57-count indictment alleging, *inter alia*, that O'Hagan defrauded his law firm and its client, Grand Met, by misappropriating for his own trading purposes material, nonpublic information regarding the tender offer. The indictment charged O'Hagan with securities fraud in violation of § 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b–5, with fraudulent trading in connection with a tender offer in violation of § 14(e) of the Exchange Act and SEC Rule 14e–3(a), and with violations of the federal mail fraud and money laundering statutes. A jury convicted O'Hagan on all counts, and he was sentenced to prison. The Eighth Circuit reversed all of the convictions, holding that § 10(b) and Rule 10b–5 liability may not be grounded on the "misappropriation theory" of securities fraud on which the prosecution relied; that Rule 14e–3(a) exceeds the SEC's § 14(e) rulemaking authority because the Rule contains no breach of fiduciary duty requirement; and that the mail fraud and money laundering convictions rested on violations of the securities laws, so could not stand once the securities fraud convictions were reversed.

Held:

1. A person who trades in securities for personal profit, using confidential information misappropriated in breach of a fiduciary duty to the source of the information, may be held liable for violating § 10(b) and Rule 10b–5. Pp. 649–666.

(a) Section 10(b) proscribes (1) using any "deceptive device" (2) "in connection with the purchase or sale of any security," in contravention of SEC rules. The Commission adopted Rule 10b–5 pursuant to its § 10(b) rulemaking authority; liability under Rule 10b–5 does not extend beyond conduct encompassed by § 10(b)'s prohibition. See, *e. g., Ernst & Ernst* v. *Hochfelder,* 425 U. S. 185, 214. Under the "traditional" or "classical theory" of insider trading liability, a violation of § 10(b) and Rule 10b–5 occurs when a corporate insider trades in his corporation's securities on the basis of material, confidential information he has obtained by reason of his position. Such trading qualifies as a "deceptive device" because there is a relationship of trust and confidence between the corporation's shareholders and the insider that gives rise to a duty to disclose or abstain from trading. *Chiarella* v. *United States,* 445 U. S. 222, 228–229. Under the complementary "misappropriation theory" urged by the Government here, a corporate "outsider" violates § 10(b) and Rule 10b–5 when he misappropriates confidential information for securities trading purposes, in breach of a fiduciary duty owed to the source of the information, rather than to the persons with whom he trades. Pp. 650–653.

(b) Misappropriation, as just defined, is the proper subject of a § 10(b) charge because it meets the statutory requirement that there be "deceptive" conduct "in connection with" a securities transaction. First, misappropriators deal in deception: A fiduciary who pretends loyalty to the principal while secretly converting the principal's information for personal gain dupes or defrauds the principal. A company's confidential information qualifies as property to which the company has a right of exclusive use; the undisclosed misappropriation of such information constitutes fraud akin to embezzlement. Cf. *Carpenter* v. *United States,* 484 U. S. 19, 25–27. Deception through nondisclosure is central to liability under the misappropriation theory. The theory is thus consistent with *Santa Fe Industries, Inc.* v. *Green,* 430 U. S. 462, 473–476, a decision underscoring that § 10(b) is not an all-purpose breach of fiduciary duty ban, but trains on conduct that is manipulative or deceptive. Conversely, full disclosure forecloses liability: Because the deception essential to the theory involves feigning fidelity to the information's source, if the fiduciary discloses to the source that he plans to trade on the information, there is no "deceptive device" and thus no § 10(b) violation. Second, § 10(b)'s requirement that the misappropriator's deceptive use of information be "in connection with the purchase or sale of [a] security" is satisfied by the misappropriation theory because the fiduciary's fraud is consummated not when he obtains the confidential information, but when, without disclosure to his principal, he uses the information in purchasing or selling securities. The transaction and the breach of duty coincide, even though the person or entity defrauded is not the other party to the trade, but is, instead, the source of the nonpublic information. Because undisclosed trading on the basis of misappropriated, nonpublic information both deceives the source of the information and harms members of the investing public, the misappropriation theory is tuned to an animating purpose of the Exchange Act: to ensure honest markets, thereby promoting investor confidence. It would make scant sense to hold a lawyer-turned-trader like O'Hagan a § 10(b) violator if he works for a law firm representing the target of a tender offer, but not if he works for a firm representing the bidder. The statute's text requires no such result. Pp. 653–659.

(c) The Eighth Circuit erred in holding that the misappropriation theory is inconsistent with § 10(b). First, that court understood the theory to require neither misrepresentation nor nondisclosure; as this Court explains, however, deceptive nondisclosure is essential to § 10(b) liability under the theory. Concretely, it was O'Hagan's failure to disclose his personal trading to Grand Met and Dorsey, in breach of his duty to do so, that made his conduct "deceptive" under § 10(b). Second, the Eighth Circuit misread this Court's precedents when it ruled that, under *Chiarella* v. *United States*, 445 U. S. 222, 230, 232, 233; *Dirks* v. *SEC*, 463 U. S. 646, 655; and *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 191, only a breach of a duty to parties to a securities transaction, or, at the most, to other market participants such as investors, is sufficient to give rise to § 10(b) liability. *Chiarella*, 445 U. S., at 238, 239, 240–243, 245, expressly left open the question of the misappropriation theory's validity, and *Dirks*, 463 U. S., at 665, 666–667, also left room for application of the misappropriation theory in cases such as this one. *Central Bank*'s discussion concerned only private civil litigation under § 10(b) and Rule 10b–5, not criminal liability. Pp. 660–665.

(d) Vital to this Court's decision that criminal liability may be sustained under the misappropriation theory is the Exchange Act's requirement that the Government prove that a person "willfully" violated Rule 10b–5 in order to establish a criminal violation, and the Act's provision that a defendant may not be imprisoned for such a violation if he proves that he had no knowledge of the Rule. The requirement of culpable intent weakens O'Hagan's charge that the misappropriation theory is too indefinite to permit the imposition of criminal liability. See *Boyce Motor Lines, Inc.* v. *United States*, 342 U. S. 337, 342. The Eighth Circuit may address on remand O'Hagan's other challenges to his § 10(b) and Rule 10b–5 convictions. Pp. 665–666.

2. As relevant to this case, the SEC did not exceed its rulemaking authority under § 14(e) by adopting Rule 14e–3(a) without requiring a showing that the trading at issue entailed a breach of fiduciary duty. Section 14(e) prohibits "fraudulent . . . acts . . . in connection with any tender offer," and authorizes the SEC to "define, and prescribe means reasonably designed to prevent, such acts." Adopted under that statu-

tory authorization, Rule 14e–3(a) forbids any person to trade on the basis of material, nonpublic information that concerns a tender offer and that the person knows or should know has been acquired from an insider of the offeror or issuer, or someone working on their behalf, unless within a reasonable time before any purchase or sale such information and its source are publicly disclosed. Rule 14e–3(a) imposes a duty to disclose or abstain from trading whether or not the trader owes a fiduciary duty to respect the confidentiality of the information. In invalidating Rule 14e–3(a), the Eighth Circuit reasoned, *inter alia,* that § 14(e) empowers the SEC to identify and regulate "fraudulent" acts, but not to create its own definition of "fraud"; that, under *Schreiber* v. *Burlington Northern, Inc.*, 472 U. S. 1, 7–8, § 10(b) interpretations guide construction of § 14(e); and that, under *Chiarella, supra,* at 228, a failure to disclose information can be "fraudulent" for § 10(b) purposes only when there is a duty to speak arising out of a fiduciary or similar relationship of trust and confidence. This Court need not resolve whether the SEC's § 14(e) fraud-defining authority is broader than its like authority under § 10(b), for Rule 14e–3(a), as applied to cases of this genre, qualifies under § 14(e) as a "means reasonably designed to prevent" fraudulent trading on material, nonpublic information in the tender offer context. A prophylactic measure properly encompasses more than the core activity prohibited. Under § 14(e), the SEC may prohibit acts not themselves fraudulent under the common law or § 10(b), if the prohibition is reasonably designed to prevent acts and practices that are fraudulent. See *Schreiber, supra,* at 11, n. 11. This Court must accord the SEC's assessment in that regard controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844. In this case, the SEC's assessment is none of these. It is a fair assumption that trading on the basis of material, nonpublic information will often involve a breach of a duty of confidentiality to the bidder or target company or their representatives. The SEC, cognizant of proof problems that could enable sophisticated traders to escape responsibility for such trading, placed in Rule 14e–3(a) a "disclose or abstain from trading" command that does not require specific proof of a breach of fiduciary duty. Insofar as it serves to prevent the type of misappropriation charged against O'Hagan, the Rule is therefore a proper exercise of the SEC's prophylactic power under § 14(e). This Court declines to consider in the first instance O'Hagan's alternate arguments that Rule 14e–3(a)'s prohibition of pre-offer trading conflicts with § 14(e) and violates due process. The Eighth Circuit may address on remand any such argument that O'Hagan has preserved. Pp. 666–677.

3. This Court's rulings on the securities fraud issues require reversal of the Eighth Circuit's judgment on the mail fraud counts. O'Hagan's other arguments attacking the mail fraud convictions on alternate grounds, which have not been addressed by the Eighth Circuit, remain open for consideration on remand. Pp. 677–678.

92 F. 3d 612, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, KENNEDY, SOUTER, and BREYER, JJ., joined, and in which SCALIA, J., joined as to Parts I, III, and IV. SCALIA, J., filed an opinion concurring in part and dissenting in part, *post*, p. 679. THOMAS, J., filed an opinion concurring in the judgment in part and dissenting in part, in which REHNQUIST, C. J., joined, *post*, p. 680.

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the briefs were *Acting Solicitor General Dellinger, Acting Assistant Attorney General Richard, Paul R. Q. Wolfson, Joseph C. Wyderko, Richard H. Walker, Paul Gonson, Jacob H. Stillman, Eric Summergrad,* and *Randall W. Quinn.*

John D. French argued the cause for respondent. With him on the brief was *Elizabeth L. Taylor.**

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the interpretation and enforcement of § 10(b) and § 14(e) of the Securities Exchange Act of 1934, and rules made by the Securities and Exchange Commission pursuant to these provisions, Rule 10b–5 and Rule 14e–3(a).

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*Briefs of *amici curiae* urging reversal were filed for the American Institute of Certified Public Accountants by *Louis A. Craco, Richard I. Miller,* and *David P. Murray;* for the Association for Investment Management and Research by *Stuart H. Singer;* and for the North American Securities Administrators Association, Inc., et al. by *Karen M. O'Brien, Meyer Eisenberg, Louis Loss,* and *Donald C. Langevoort.*

Briefs of *amici curiae* urging affirmance were filed for Law Professors and Counsel by *Richard W. Painter* and *Douglas W. Dunham;* and for the National Association of Criminal Defense Lawyers by *Arthur F. Mathews, David M. Becker, Andrew B. Weissman, Robert F. Hoyt, Lisa Kemler, Milton V. Freeman,* and *Elkan Abramowitz.*

Two prime questions are presented. The first relates to the misappropriation of material, nonpublic information for securities trading; the second concerns fraudulent practices in the tender offer setting. In particular, we address and resolve these issues: (1) Is a person who trades in securities for personal profit, using confidential information misappropriated in breach of a fiduciary duty to the source of the information, guilty of violating § 10(b) and Rule 10b–5? (2) Did the Commission exceed its rulemaking authority by adopting Rule 14e–3(a), which proscribes trading on undisclosed information in the tender offer setting, even in the absence of a duty to disclose? Our answer to the first question is yes, and to the second question, viewed in the context of this case, no.

I

Respondent James Herman O'Hagan was a partner in the law firm of Dorsey & Whitney in Minneapolis, Minnesota. In July 1988, Grand Metropolitan PLC (Grand Met), a company based in London, England, retained Dorsey & Whitney as local counsel to represent Grand Met regarding a potential tender offer for the common stock of the Pillsbury Company, headquartered in Minneapolis. Both Grand Met and Dorsey & Whitney took precautions to protect the confidentiality of Grand Met's tender offer plans. O'Hagan did no work on the Grand Met representation. Dorsey & Whitney withdrew from representing Grand Met on September 9, 1988. Less than a month later, on October 4, 1988, Grand Met publicly announced its tender offer for Pillsbury stock.

On August 18, 1988, while Dorsey & Whitney was still representing Grand Met, O'Hagan began purchasing call options for Pillsbury stock. Each option gave him the right to purchase 100 shares of Pillsbury stock by a specified date in September 1988. Later in August and in September, O'Hagan made additional purchases of Pillsbury call options. By the end of September, he owned 2,500 unexpired Pillsbury options, apparently more than any other individual investor. See App. 85, 148. O'Hagan also purchased, in September 1988, some 5,000 shares of Pillsbury common stock, at a price just under $39 per share. When Grand Met announced its tender offer in October, the price of Pillsbury stock rose to nearly $60 per share. O'Hagan then sold his Pillsbury call options and common stock, making a profit of more than $4.3 million.

The Securities and Exchange Commission (SEC or Commission) initiated an investigation into O'Hagan's transactions, culminating in a 57-count indictment. The indictment alleged that O'Hagan defrauded his law firm and its client, Grand Met, by using for his own trading purposes material, nonpublic information regarding Grand Met's planned tender offer. *Id.*, at 8.[1] According to the indictment, O'Hagan used the profits he gained through this trading to conceal his previous embezzlement and conversion of unrelated client trust funds. *Id.*, at 10.[2] O'Hagan was charged with 20 counts of mail fraud, in violation of 18 U. S. C. § 1341; 17 counts of securities fraud, in violation of § 10(b) of the Securities Exchange Act of 1934 (Exchange Act), 48 Stat. 891, 15 U. S. C. § 78j(b), and SEC Rule 10b–5, 17 CFR § 240.10b–5

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[1] As evidence that O'Hagan traded on the basis of nonpublic information misappropriated from his law firm, the Government relied on a conversation between O'Hagan and the Dorsey & Whitney partner heading the firm's Grand Met representation. That conversation allegedly took place shortly before August 26, 1988. See Brief for United States 4. O'Hagan urges that the Government's evidence does not show he traded on the basis of nonpublic information. O'Hagan points to news reports on August 18 and 22, 1988, that Grand Met was interested in acquiring Pillsbury, and to an earlier, August 12, 1988, news report that Grand Met had put up its hotel chain for auction to raise funds for an acquisition. See Brief for Respondent 4 (citing App. 73–74, 78–80). O'Hagan's challenge to the sufficiency of the evidence remains open for consideration on remand.

[2] O'Hagan was convicted of theft in state court, sentenced to 30 months' imprisonment, and fined. See *State* v. *O'Hagan*, 474 N. W. 2d 613, 615, 623 (Minn. App. 1991). The Supreme Court of Minnesota disbarred O'Hagan from the practice of law. See *In re O'Hagan*, 450 N. W. 2d 571 (1990).

(1996); 17 counts of fraudulent trading in connection with a tender offer, in violation of § 14(e) of the Exchange Act, 15 U. S. C. § 78n(e), and SEC Rule 14e–3(a), 17 CFR § 240.14e–3(a) (1996); and 3 counts of violating federal money laundering statutes, 18 U. S. C. §§ 1956(a)(1)(B)(i), 1957. See App. 13–24. A jury convicted O'Hagan on all 57 counts, and he was sentenced to a 41-month term of imprisonment.

A divided panel of the Court of Appeals for the Eighth Circuit reversed all of O'Hagan's convictions. 92 F. 3d 612 (1996). Liability under § 10(b) and Rule 10b–5, the Eighth Circuit held, may not be grounded on the "misappropriation theory" of securities fraud on which the prosecution relied. *Id.*, at 622. The Court of Appeals also held that Rule 14e–3(a)—which prohibits trading while in possession of material, nonpublic information relating to a tender offer—exceeds the SEC's § 14(e) rulemaking authority because the Rule contains no breach of fiduciary duty requirement. *Id.*, at 627. The Eighth Circuit further concluded that O'Hagan's mail fraud and money laundering convictions rested on violations of the securities laws, and therefore could not stand once the securities fraud convictions were reversed. *Id.*, at 627–628. Judge Fagg, dissenting, stated that he would recognize and enforce the misappropriation theory, and would hold that the SEC did not exceed its rulemaking authority when it adopted Rule 14e–3(a) without requiring proof of a breach of fiduciary duty. *Id.*, at 628.

Decisions of the Courts of Appeals are in conflict on the propriety of the misappropriation theory under § 10(b) and Rule 10b–5, see *infra* this page and 650, and n. 3, and on the legitimacy of Rule 14e–3(a) under § 14(e), see *infra*, at 669–670. We granted certiorari, 519 U. S. 1087 (1997), and now reverse the Eighth Circuit's judgment.

II

We address first the Court of Appeals' reversal of O'Hagan's convictions under § 10(b) and Rule 10b–5. Following the Fourth Circuit's lead, see *United States* v. *Bryan*, 58 F. 3d 933, 943–959 (1995), the Eighth Circuit rejected the misappropriation theory as a basis for § 10(b) liability. We hold, in accord with several other Courts of Appeals,[3] that criminal liability under § 10(b) may be predicated on the misappropriation theory.[4]

A

In pertinent part, § 10(b) of the Exchange Act provides:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> . . . . .
>
> "(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U. S. C. § 78j(b).

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[3] See, *e. g., United States* v. *Chestman*, 947 F. 2d 551, 566 (CA2 1991) (en banc), cert. denied, 503 U. S. 1004 (1992); *SEC* v. *Cherif*, 933 F. 2d 403, 410 (CA7 1991), cert. denied, 502 U. S. 1071 (1992); *SEC* v. *Clark*, 915 F. 2d 439, 453 (CA9 1990).

[4] Twice before we have been presented with the question whether criminal liability for violation of § 10(b) may be based on a misappropriation theory. In *Chiarella* v. *United States*, 445 U. S. 222, 235–237 (1980), the jury had received no misappropriation theory instructions, so we declined to address the question. See *infra*, at 661. In *Carpenter* v. *United States*, 484 U. S. 19, 24 (1987), the Court divided evenly on whether, under the circumstances of that case, convictions resting on the misappropriation theory should be affirmed. See Aldave, The Misappropriation Theory: *Carpenter* and Its Aftermath, 49 Ohio St. L. J. 373, 375 (1988) (observing that "*Carpenter* was, by any reckoning, an unusual case," for the information there misappropriated belonged not to a company preparing to engage in securities transactions, *e. g.*, a bidder in a corporate acquisition, but to the Wall Street Journal).

The statute thus proscribes (1) using any deceptive device (2) in connection with the purchase or sale of securities, in contravention of rules prescribed by the Commission. The provision, as written, does not confine its coverage to deception of a purchaser or seller of securities, see *United States* v. *Newman*, 664 F. 2d 12, 17 (CA2 1981); rather, the statute reaches any deceptive device used "in connection with the purchase or sale of any security."

Pursuant to its § 10(b) rulemaking authority, the Commission has adopted Rule 10b–5, which, as relevant here, provides:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> "(a) To employ any device, scheme, or artifice to defraud, [or]
>
> . . . . .
>
> "(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> "in connection with the purchase or sale of any security." 17 CFR § 240.10b–5 (1996).

Liability under Rule 10b–5, our precedent indicates, does not extend beyond conduct encompassed by § 10(b)'s prohibition. See *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 214 (1976) (scope of Rule 10b–5 cannot exceed power Congress granted Commission under § 10(b)); see also *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 173 (1994) ("We have refused to allow [private] 10b–5 challenges to conduct not prohibited by the text of the statute.").

Under the "traditional" or "classical theory" of insider trading liability, § 10(b) and Rule 10b–5 are violated when a corporate insider trades in the securities of his corporation on the basis of material, nonpublic information. Trading on such information qualifies as a "deceptive device" under § 10(b), we have affirmed, because "a relationship of trust and confidence [exists] between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation." *Chiarella* v. *United States,* 445 U. S. 222, 228 (1980). That relationship, we recognized, "gives rise to a duty to disclose [or to abstain from trading] because of the 'necessity of preventing a corporate insider from . . . tak[ing] unfair advantage of . . . uninformed . . . stockholders.'" *Id.,* at 228–229 (citation omitted). The classical theory applies not only to officers, directors, and other permanent insiders of a corporation, but also to attorneys, accountants, consultants, and others who temporarily become fiduciaries of a corporation. See *Dirks* v. *SEC,* 463 U. S. 646, 655, n. 14 (1983).

The "misappropriation theory" holds that a person commits fraud "in connection with" a securities transaction, and thereby violates § 10(b) and Rule 10b–5, when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information. See Brief for United States 14. Under this theory, a fiduciary's undisclosed, self-serving use of a principal's information to purchase or sell securities, in breach of a duty of loyalty and confidentiality, defrauds the principal of the exclusive use of that information. In lieu of premising liability on a fiduciary relationship between company insider and purchaser or seller of the company's stock, the misappropriation theory premises liability on a fiduciary-turned-trader's deception of those who entrusted him with access to confidential information.

The two theories are complementary, each addressing efforts to capitalize on nonpublic information through the purchase or sale of securities. The classical theory targets a corporate insider's breach of duty to shareholders with whom the insider transacts; the misappropriation theory outlaws trading on the basis of nonpublic information by a corporate "outsider" in breach of a duty owed not to a trading party, but to the source of the information. The misappropriation theory is thus designed to "protec[t] the integrity of the securities markets against abuses by 'outsiders' to a corporation who have access to confidential information that will affect th[e] corporation's security price when revealed, but who owe no fiduciary or other duty to that corporation's shareholders." *Ibid.*

In this case, the indictment alleged that O'Hagan, in breach of a duty of trust and confidence he owed to his law firm, Dorsey & Whitney, and to its client, Grand Met, traded on the basis of nonpublic information regarding Grand Met's planned tender offer for Pillsbury common stock. App. 16. This conduct, the Government charged, constituted a fraudulent device in connection with the purchase and sale of securities.[5]

B

We agree with the Government that misappropriation, as just defined, satisfies § 10(b)'s requirement that chargeable conduct involve a "deceptive device or contrivance" used "in connection with" the purchase or sale of securities. We observe, first, that misappropriators, as the Government describes them, deal in deception. A fiduciary who "[pretends] loyalty to the principal while secretly converting the principal's information for personal gain," Brief for United States

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[5] The Government could not have prosecuted O'Hagan under the classical theory, for O'Hagan was not an "insider" of Pillsbury, the corporation in whose stock he traded. Although an "outsider" with respect to Pillsbury, O'Hagan had an intimate association with, and was found to have traded on confidential information from, Dorsey & Whitney, counsel to tender offeror Grand Met. Under the misappropriation theory, O'Hagan's securities trading does not escape Exchange Act sanction, as it would under JUSTICE THOMAS' dissenting view, simply because he was associated with, and gained nonpublic information from, the bidder, rather than the target.

17, "dupes" or defrauds the principal. See Aldave, Misappropriation: A General Theory of Liability for Trading on Nonpublic Information, 13 Hofstra L. Rev. 101, 119 (1984).

We addressed fraud of the same species in *Carpenter* v. *United States*, 484 U. S. 19 (1987), which involved the mail fraud statute's proscription of "any scheme or artifice to defraud," 18 U. S. C. § 1341. Affirming convictions under that statute, we said in *Carpenter* that an employee's undertaking not to reveal his employer's confidential information "became a sham" when the employee provided the information to his co-conspirators in a scheme to obtain trading profits. 484 U. S., at 27. A company's confidential information, we recognized in *Carpenter*, qualifies as property to which the company has a right of exclusive use. *Id.*, at 25–27. The undisclosed misappropriation of such information, in violation of a fiduciary duty, the Court said in *Carpenter*, constitutes fraud akin to embezzlement—" 'the fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another.' " *Id.*, at 27 (quoting *Grin* v. *Shine*, 187 U. S. 181, 189 (1902)); see Aldave, 13 Hofstra L. Rev., at 119. *Carpenter*'s discussion of the fraudulent misuse of confidential information, the Government notes, "is a particularly apt source of guidance here, because [the mail fraud statute] (like Section 10(b)) has long been held to require deception, not merely the breach of a fiduciary duty." Brief for United States 18, n. 9 (citation omitted).

Deception through nondisclosure is central to the theory of liability for which the Government seeks recognition. As counsel for the Government stated in explanation of the theory at oral argument: "To satisfy the common law rule that a trustee may not use the property that [has] been entrusted [to] him, there would have to be consent. To satisfy the requirement of the Securities Act that there be no deception, there would only have to be disclosure." Tr. of Oral Arg. 12; see generally Restatement (Second) of Agency §§ 390, 395

(1958) (agent's disclosure obligation regarding use of confidential information).[6]

The misappropriation theory advanced by the Government is consistent with *Santa Fe Industries, Inc.* v. *Green,* 430 U. S. 462 (1977), a decision underscoring that § 10(b) is not an all-purpose breach of fiduciary duty ban; rather, it trains on conduct involving manipulation or deception. See *id.,* at 473–476. In contrast to the Government's allegations in this case, in *Santa Fe Industries,* all pertinent facts were disclosed by the persons charged with violating § 10(b) and Rule 10b–5, see *id.,* at 474; therefore, there was no deception through nondisclosure to which liability under those provisions could attach, see *id.,* at 476. Similarly, full disclosure forecloses liability under the misappropriation theory: Because the deception essential to the misappropriation theory involves feigning fidelity to the source of information, if the fiduciary discloses to the source that he plans to trade on the nonpublic information, there is no "deceptive device" and thus no § 10(b) violation—although the fiduciary-turned-trader may remain liable under state law for breach of a duty of loyalty.[7]

We turn next to the § 10(b) requirement that the misappropriator's deceptive use of information be "in connection with the purchase or sale of [a] security." This element is satisfied because the fiduciary's fraud is consummated, not when the fiduciary gains the confidential information, but when, without disclosure to his principal, he uses the information to purchase or sell securities. The securities transaction and the breach of duty thus coincide. This is so even though the person or entity defrauded is not the other party to the trade, but is, instead, the source of the nonpublic information. See Aldave, 13 Hofstra L. Rev., at 120 ("a fraud or deceit can be practiced on one person, with resultant harm to another person or group of persons"). A misappropriator who trades on the basis of material, nonpublic information, in short, gains his advantageous market position through deception; he deceives the source of the information and simultaneously harms members of the investing public. See *id.*, at 120–121, and n. 107.

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[6] Under the misappropriation theory urged in this case, the disclosure obligation runs to the source of the information, here, Dorsey & Whitney and Grand Met. Chief Justice Burger, dissenting in *Chiarella,* advanced a broader reading of § 10(b) and Rule 10b–5; the disclosure obligation, as he envisioned it, ran to those with whom the misappropriator trades. 445 U. S., at 240 ("a person who has misappropriated nonpublic information has an absolute duty to disclose that information or to refrain from trading"); see also *id.,* at 243, n. 4. The Government does not propose that we adopt a misappropriation theory of that breadth.

[7] Where, however, a person trading on the basis of material, nonpublic information owes a duty of loyalty and confidentiality to two entities or persons—for example, a law firm and its client—but makes disclosure to only one, the trader may still be liable under the misappropriation theory.

The misappropriation theory targets information of a sort that misappropriators ordinarily capitalize upon to gain no-risk profits through the purchase or sale of securities. Should a misappropriator put such information to other use, the statute's prohibition would not be implicated. The theory does not catch all conceivable forms of fraud involving confidential information; rather, it catches fraudulent means of capitalizing on such information through securities transactions.

The Government notes another limitation on the forms of fraud § 10(b) reaches: "The misappropriation theory would not . . . apply to a case in which a person defrauded a bank into giving him a loan or embezzled cash from another, and then used the proceeds of the misdeed to purchase securities." Brief for United States 24, n. 13. In such a case, the Government states, "the proceeds would have value to the malefactor apart from their use in a securities transaction, and the fraud would be complete as soon as the money was obtained." *Ibid.* In other words, money can buy, if not anything, then at least many things; its misappropriation may thus be viewed as sufficiently detached from a subsequent securities transaction that § 10(b)'s "in connection with" requirement would not be met. *Ibid.*

JUSTICE THOMAS' charge that the misappropriation theory is incoherent because information, like funds, can be put to multiple uses, see *post*, at 681–686 (opinion concurring in judgment in part and dissenting in part), misses the point. The Exchange Act was enacted in part "to insure the maintenance of fair and honest markets," 15 U. S. C. § 78b, and there is no question that fraudulent uses of confidential information fall within § 10(b)'s prohibition if the fraud is "in connection with" a securities transaction. It is hardly remarkable that a rule suitably applied to the fraudulent uses of certain kinds of information would be stretched beyond reason were it applied to the fraudulent use of money.

JUSTICE THOMAS does catch the Government in overstatement. Observing that money can be used for all manner of purposes and purchases, the Government urges that confidential information of the kind at issue derives its value *only* from its utility in securities trading. See Brief for United States 10, 21; *post*, at 683–684 (several times emphasizing the word "only"). Substitute "ordinarily" for "only," and the Government is on the mark.[8]

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[8] JUSTICE THOMAS' evident struggle to invent other uses to which O'Hagan plausibly might have put the nonpublic information, see *post*, at 685, is telling. It is imaginative to suggest that a trade journal would have paid O'Hagan dollars in the millions to publish his information. See Tr. of Oral Arg. 36–37. Counsel for O'Hagan hypothesized, as a nontrading use, that O'Hagan could have "misappropriat[ed] this information of [his] law firm and its client, deliver[ed] it to [Pillsbury], and suggest[ed] that [Pillsbury] in the future . . . might find it very desirable to use [O'Hagan] for legal work." *Id.*, at 37. But Pillsbury might well have had large doubts about engaging for its legal work a lawyer who so stunningly displayed his readiness to betray a client's confidence. Nor is the Commission's theory "incoherent" or "inconsistent," *post*, at 680, 692, for failing to inhibit use of confidential information for "personal amusement . . . in a fantasy stock trading game," *post*, at 685.

Our recognition that the Government's "only" is an overstatement has provoked the dissent to cry "new theory." See *post,* at 687–689. But the very case on which JUSTICE THOMAS relies, *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.,* 463 U. S. 29 (1983), shows the extremity of that charge. In *State Farm,* we reviewed an agency's rescission of a rule under the same "arbitrary and capricious" standard by which the promulgation of a rule under the relevant statute was to be judged, see *id.,* at 41–42; in our decision concluding that the agency had not adequately explained its regulatory action, see *id.,* at 57, we cautioned that a "reviewing court should not attempt itself to make up for such deficiencies," *id.,* at 43. Here, by contrast, Rule 10b–5's promulgation has not been challenged; we consider only the Government's charge that O'Hagan's alleged fraudulent conduct falls within the prohibitions of the Rule and § 10(b). In this context, we acknowledge simply that, in defending the Government's interpretation of the Rule and statute in this Court, the Government's lawyers have pressed a solid point too far, something lawyers, occasionally even judges, are wont to do.

The misappropriation theory comports with § 10(b)'s language, which requires deception "in connection with the purchase or sale of any security," not deception of an identifiable purchaser or seller. The theory is also well tuned to an animating purpose of the Exchange Act: to insure honest securities markets and thereby promote investor confidence. See 45 Fed. Reg. 60412 (1980) (trading on misappropriated information "undermines the integrity of, and investor confidence in, the securities markets"). Although informational disparity is inevitable in the securities markets, investors likely would hesitate to venture their capital in a market where trading based on misappropriated nonpublic information is unchecked by law. An investor's informational disadvantage vis-à-vis a misappropriator with material, nonpublic information stems from contrivance, not luck; it is a disadvantage that cannot be overcome with research or skill. See Brudney, Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws, 93 Harv. L. Rev. 322, 356 (1979) ("If the market is thought to be systematically populated with . . . transactors [trading on the basis of misappropriated information] some investors will refrain from dealing altogether, and others will incur costs to avoid dealing with such transactors or corruptly to overcome their unerodable informational advantages."); Aldave, 13 Hofstra L. Rev., at 122–123.

In sum, considering the inhibiting impact on market participation of trading on misappropriated information, and the congressional purposes underlying § 10(b), it makes scant sense to hold a lawyer like O'Hagan a § 10(b) violator if he works for a law firm representing the target of a tender offer, but not if he works for a law firm representing the bidder. The text of the statute requires no such result.[9] The misappropriation at issue here was properly made the subject of a § 10(b) charge because it meets the statutory requirement that there be "deceptive" conduct "in connection with" securities transactions.

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[9] As noted earlier, however, see *supra*, at 654–655, the textual requirement of deception precludes § 10(b) liability when a person trading on the basis of nonpublic information has disclosed his trading plans to, or obtained authorization from, the principal—even though such conduct may affect the securities markets in the same manner as the conduct reached by the misappropriation theory. Contrary to JUSTICE THOMAS' suggestion, see *post*, at 689–691, the fact that § 10(b) is only a partial antidote to the problems it was designed to alleviate does not call into question its prohibition of conduct that falls within its textual proscription. Moreover, once a disloyal agent discloses his imminent breach of duty, his principal may seek appropriate equitable relief under state law. Furthermore, in the context of a tender offer, the principal who authorizes an agent's trading on confidential information may, in the Commission's view, incur liability for an Exchange Act violation under Rule 14e–3(a).

C

The Court of Appeals rejected the misappropriation theory primarily on two grounds. First, as the Eighth Circuit comprehended the theory, it requires neither misrepresentation nor nondisclosure. See 92 F. 3d, at 618. As we just explained, however, see *supra,* at 654–655, deceptive nondisclosure is essential to the § 10(b) liability at issue. Concretely, in this case, "it [was O'Hagan's] failure to disclose his personal trading to Grand Met and Dorsey, in breach of his duty to do so, that ma[de] his conduct 'deceptive' within the meaning of [§]10(b)." Reply Brief 7.

Second and "more obvious," the Court of Appeals said, the misappropriation theory is not moored to § 10(b)'s requirement that "the fraud be 'in connection with the purchase or sale of any security.'" 92 F. 3d, at 618 (quoting 15 U. S. C. § 78j(b)). According to the Eighth Circuit, three of our decisions reveal that § 10(b) liability cannot be predicated on a duty owed to the source of nonpublic information: *Chiarella* v. *United States,* 445 U. S. 222 (1980); *Dirks* v. *SEC,* 463 U. S. 646 (1983); and *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.,* 511 U. S. 164 (1994). "[O]nly a breach of a duty to parties to the securities transaction," the Court of Appeals concluded, "or, at the most, to other market participants such as investors, will be sufficient to give rise to § 10(b) liability." 92 F. 3d, at 618. We read the statute and our precedent differently, and note again that § 10(b) refers to "the purchase or sale of any security," not to identifiable purchasers or sellers of securities.

Chiarella involved securities trades by a printer employed at a shop that printed documents announcing corporate takeover bids. See 445 U. S., at 224. Deducing the names of target companies from documents he handled, the printer bought shares of the targets before takeover bids were announced, expecting (correctly) that the share prices would rise upon announcement. In these transactions, the printer did not disclose to the sellers of the securities (the target companies' shareholders) the nonpublic information on which he traded. See *ibid.* For that trading, the printer was convicted of violating § 10(b) and Rule 10b–5. We reversed the Court of Appeals judgment that had affirmed the conviction. See *id.*, at 225.

The jury in *Chiarella* had been instructed that it could convict the defendant if he willfully failed to inform sellers of target company securities that he knew of a takeover bid that would increase the value of their shares. See *id.*, at 226. Emphasizing that the printer had no agency or other fiduciary relationship with the sellers, we held that liability could not be imposed on so broad a theory. See *id.*, at 235. There is under § 10(b), we explained, no "general duty between all participants in market transactions to forgo actions based on material, nonpublic information." *Id.*, at 233. Under established doctrine, we said, a duty to disclose or abstain from trading "arises from a specific relationship between two parties." *Ibid.*

The Court did not hold in *Chiarella* that the *only* relationship prompting liability for trading on undisclosed information is the relationship between a corporation's insiders and shareholders. That is evident from our response to the Government's argument before this Court that the printer's misappropriation of information from his employer for purposes of securities trading—in violation of a duty of confidentiality owed to the acquiring companies—constituted fraud in connection with the purchase or sale of a security, and thereby satisfied the terms of § 10(b). *Id.*, at 235–236. The Court declined to reach that potential basis for the printer's liability, because the theory had not been submitted to the jury. See *id.*, at 236–237. But four Justices found merit in it. See *id.*, at 239 (Brennan, J., concurring in judgment); *id.*, at 240–243 (Burger, C. J., dissenting); *id.*, at 245 (Blackmun, J., joined by Marshall, J., dissenting). And a fifth Justice stated that the Court "wisely le[ft] the resolution of this issue for another day." *Id.*, at 238 (STEVENS, J., concurring).

Chiarella thus expressly left open the misappropriation theory before us today. Certain statements in *Chiarella,* however, led the Eighth Circuit in the instant case to conclude that § 10(b) liability hinges exclusively on a breach of duty owed to a purchaser or seller of securities. See 92 F. 3d, at 618. The Court said in *Chiarella* that § 10(b) liability "is premised upon a duty to disclose arising from a relationship of trust and confidence *between parties to a transaction,*" 445 U. S., at 230 (emphasis added), and observed that the printshop employee defendant in that case "was not a person in whom the sellers had placed their trust and confidence," see *id.*, at 232. These statements rejected the notion that § 10(b) stretches so far as to impose "a general duty between all participants in market transactions to forgo actions based on material, nonpublic information," *id.*, at 233, and we confine them to that context. The statements highlighted by the Eighth Circuit, in short, appear in an opinion carefully leaving for future resolution the validity of the misappropriation theory, and therefore cannot be read to foreclose that theory.

Dirks, too, left room for application of the misappropriation theory in cases like the one we confront.[10] *Dirks* involved an investment analyst who had received information from a former insider of a corporation with which the analyst had no connection. See 463 U. S., at 648–649. The information indicated that the corporation had engaged in a massive fraud. The analyst investigated the fraud, obtaining corroborating information from employees of the corporation. During his investigation, the analyst discussed his findings with clients and investors, some of whom sold their holdings in the company the analyst suspected of gross wrongdoing. See *id.*, at 649.

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[10] The Eighth Circuit's conclusion to the contrary was based in large part on *Dirks*'s reiteration of the *Chiarella* language quoted and discussed above. See 92 F. 3d 612, 618–619 (1996).

The SEC censured the analyst for, *inter alia,* aiding and abetting § 10(b) and Rule 10b–5 violations by clients and investors who sold their holdings based on the nonpublic information the analyst passed on. See *id.*, at 650–652. In the SEC's view, the analyst, as a "tippee" of corporation insiders, had a duty under § 10(b) and Rule 10b–5 to refrain from communicating the nonpublic information to persons likely to trade on the basis of it. See *id.*, at 651, 655–656. This Court found no such obligation, see *id.*, at 665–667, and repeated the key point made in *Chiarella:* There is no " 'general duty between all participants in market transactions to forgo actions based on material, nonpublic information.' " 463 U. S., at 655 (quoting *Chiarella,* 445 U. S., at 233); see Aldave, 13 Hofstra L. Rev., at 122 (misappropriation theory bars only "trading on the basis of information that the wrongdoer converted to his own use in violation of some fiduciary, contractual, or similar obligation to the owner or rightful possessor of the information").

No showing had been made in *Dirks* that the "tippers" had violated any duty by disclosing to the analyst nonpublic information about their former employer. The insiders had acted not for personal profit, but to expose a massive fraud within the corporation. See 463 U. S., at 666–667. Absent any violation by the tippers, there could be no derivative liability for the tippee. See *id.*, at 667. Most important for purposes of the instant case, the Court observed in *Dirks:* "There was no expectation by [the analyst's] sources that he would keep their information in confidence. Nor did [the analyst] misappropriate or illegally obtain the information . . . ." *Id.*, at 665. *Dirks* thus presents no suggestion that a person who gains nonpublic information through misappropriation in breach of a fiduciary duty escapes § 10(b) liability when, without alerting the source, he trades on the information.

Last of the three cases the Eighth Circuit regarded as warranting disapproval of the misappropriation theory, *Cen-*

tral Bank held that "a private plaintiff may not maintain an aiding and abetting suit under § 10(b)." 511 U. S., at 191. We immediately cautioned in *Central Bank* that secondary actors in the securities markets may sometimes be chargeable under the securities Acts: "Any person or entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) *on which a purchaser or seller of securities relies* may be liable as a primary violator under 10b–5, assuming . . . the requirements for primary liability under Rule 10b–5 are met." *Ibid.* (emphasis added). The Eighth Circuit isolated the statement just quoted and drew from it the conclusion that § 10(b) covers only deceptive statements or omissions on which purchasers and sellers, and perhaps other market participants, rely. See 92 F. 3d, at 619. It is evident from the question presented in *Central Bank*, however, that this Court, in the quoted passage, sought only to clarify that secondary actors, although not subject to aiding and abetting liability, remain subject to primary liability under § 10(b) and Rule 10b–5 for certain conduct.

Furthermore, *Central Bank*'s discussion concerned only private civil litigation under § 10(b) and Rule 10b–5, not criminal liability. *Central Bank*'s reference to purchasers or sellers of securities must be read in light of a longstanding limitation on private § 10(b) suits. In *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723 (1975), we held that only actual purchasers or sellers of securities may maintain a private civil action under § 10(b) and Rule 10b–5. We so confined the § 10(b) private right of action because of "policy considerations." *Id.*, at 737. In particular, *Blue Chip Stamps* recognized the abuse potential and proof problems inherent in suits by investors who neither bought nor sold, but asserted they would have traded absent fraudulent conduct by others. See *id.*, at 739–747; see also *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 285

(1992) (O'CONNOR, J., concurring in part and concurring in judgment); *id.*, at 289–290 (SCALIA, J., concurring in judgment). Criminal prosecutions do not present the dangers the Court addressed in *Blue Chip Stamps*, so that decision is "inapplicable" to indictments for violations of § 10(b) and Rule 10b–5. *United States* v. *Naftalin*, 441 U. S. 768, 774, n. 6 (1979); see also *Holmes*, 503 U. S., at 281 (O'CONNOR, J., concurring in part and concurring in judgment) ("[T]he purchaser/seller standing requirement for private civil actions under § 10(b) and Rule 10b–5 is of no import in criminal prosecutions for willful violations of those provisions.").

In sum, the misappropriation theory, as we have examined and explained it in this opinion, is both consistent with the statute and with our precedent.[11] Vital to our decision that criminal liability may be sustained under the misappropriation theory, we emphasize, are two sturdy safeguards Congress has provided regarding scienter. To establish a criminal violation of Rule 10b–5, the Government must prove that a person "willfully" violated the provision. See 15 U. S. C.

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[11] The United States additionally argues that Congress confirmed the validity of the misappropriation theory in the Insider Trading and Securities Fraud Enforcement Act of 1988 (ITSFEA), § 2(1), 102 Stat. 4677, note following 15 U. S. C. § 78u–1. See Brief for United States 32–35. ITSFEA declares that "the rules and regulations of the Securities and Exchange Commission under the Securities Exchange Act of 1934 . . . governing trading while in possession of material, nonpublic information are, as required by such Act, necessary and appropriate in the public interest and for the protection of investors." Note following 15 U. S. C. § 78u–1. ITSFEA also includes a new § 20A(a) of the Exchange Act expressly providing a private cause of action against persons who violate the Exchange Act "by purchasing or selling a security while in possession of material, nonpublic information"; such an action may be brought by "any person who, contemporaneously with the purchase or sale of securities that is the subject of such violation, has purchased . . . or sold . . . securities of the same class." 15 U. S. C. § 78t–1(a). Because we uphold the misappropriation theory on the basis of § 10(b) itself, we do not address ITSFEA's significance for cases of this genre.

§ 78ff(a).[12] Furthermore, a defendant may not be imprisoned for violating Rule 10b–5 if he proves that he had no knowledge of the Rule. See *ibid.*[13] O'Hagan's charge that the misappropriation theory is too indefinite to permit the imposition of criminal liability, see Brief for Respondent 30–33, thus fails not only because the theory is limited to those who breach a recognized duty. In addition, the statute's "requirement of the presence of culpable intent as a necessary element of the offense does much to destroy any force in the argument that application of the [statute]" in circumstances such as O'Hagan's is unjust. *Boyce Motor Lines, Inc.* v. *United States*, 342 U. S. 337, 342 (1952).

The Eighth Circuit erred in holding that the misappropriation theory is inconsistent with § 10(b). The Court of Appeals may address on remand O'Hagan's other challenges to his convictions under § 10(b) and Rule 10b–5.

III

We consider next the ground on which the Court of Appeals reversed O'Hagan's convictions for fraudulent trading in connection with a tender offer, in violation of § 14(e) of the Exchange Act and SEC Rule 14e–3(a). A sole question is before us as to these convictions: Did the Commission, as the Court of Appeals held, exceed its rulemaking authority under § 14(e) when it adopted Rule 14e–3(a) without requiring a showing that the trading at issue entailed a breach of fiduciary duty? We hold that the Commission, in this regard and to the extent relevant to this case, did not exceed its authority.

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[12] In relevant part, § 32 of the Exchange Act, as set forth in 15 U. S. C. § 78ff(a), provides:

"Any person who willfully violates any provision of this chapter . . . or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter . . . shall upon conviction be fined not more than $1,000,000, or imprisoned not more than 10 years, or both . . . ; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation."

[13] The statute provides no such defense to imposition of monetary fines. See *ibid.*

The governing statutory provision, § 14(e) of the Exchange Act, reads in relevant part:

> "It shall be unlawful for any person . . . to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer . . . . The [SEC] shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative." 15 U. S. C. § 78n(e).

Section 14(e)'s first sentence prohibits fraudulent acts in connection with a tender offer. This self-operating proscription was one of several provisions added to the Exchange Act in 1968 by the Williams Act, 82 Stat. 454. The section's second sentence delegates definitional and prophylactic rulemaking authority to the Commission. Congress added this rulemaking delegation to § 14(e) in 1970 amendments to the Williams Act. See § 5, 84 Stat. 1497.

Through § 14(e) and other provisions on disclosure in the Williams Act,[14] Congress sought to ensure that shareholders "confronted by a cash tender offer for their stock [would] not be required to respond without adequate information." *Rondeau* v. *Mosinee Paper Corp.*, 422 U. S. 49, 58 (1975); see *Lewis* v. *McGraw*, 619 F. 2d 192, 195 (CA2 1980) *(per curiam)*

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[14] In addition to § 14(e), the Williams Act and the 1970 amendments added to the Exchange Act the following provisions concerning disclosure: § 13(d), 15 U. S. C. § 78m(d) (disclosure requirements for persons acquiring more than five percent of certain classes of securities); § 13(e), 15 U. S. C. § 78m(e) (authorizing Commission to adopt disclosure requirements for certain repurchases of securities by issuer); § 14(d), 15 U. S. C. § 78n(d) (disclosure requirements when tender offer results in offeror owning more than five percent of a class of securities); § 14(f), 15 U. S. C. § 78n(f) (disclosure requirements when tender offer results in new corporate directors constituting a majority).

("very purpose" of Williams Act was "informed decisionmaking by shareholders"). As we recognized in *Schreiber* v. *Burlington Northern, Inc.*, 472 U. S. 1 (1985), Congress designed the Williams Act to make "disclosure, rather than court-imposed principles of 'fairness' or 'artificiality,' . . . the preferred method of market regulation." *Id.*, at 9, n. 8. Section 14(e), we explained, "supplements the more precise disclosure provisions found elsewhere in the Williams Act, while requiring disclosure more explicitly addressed to the tender offer context than that required by § 10(b)." *Id.*, at 10–11.

Relying on § 14(e)'s rulemaking authorization, the Commission, in 1980, promulgated Rule 14e–3(a). That measure provides:

> "(a) If any person has taken a substantial step or steps to commence, or has commenced, a tender offer (the 'offering person'), it shall constitute a fraudulent, deceptive or manipulative act or practice within the meaning of section 14(e) of the [Exchange] Act for any other person who is in possession of material information relating to such tender offer which information he knows or has reason to know is nonpublic and which he knows or has reason to know has been acquired directly or indirectly from:
>
> "(1) The offering person,
>
> "(2) The issuer of the securities sought or to be sought by such tender offer, or
>
> "(3) Any officer, director, partner or employee or any other person acting on behalf of the offering person or such issuer, to purchase or sell or cause to be purchased or sold any of such securities or any securities convertible into or exchangeable for any such securities or any option or right to obtain or to dispose of any of the foregoing securities, unless within a reasonable time prior to any purchase or sale such information and its source

> are publicly disclosed by press release or otherwise." 17 CFR § 240.14e–3(a) (1996).

As characterized by the Commission, Rule 14e–3(a) is a "disclose or abstain from trading" requirement. 45 Fed. Reg. 60410 (1980).[15] The Second Circuit concisely described the Rule's thrust:

> "One violates Rule 14e–3(a) if he trades on the basis of material nonpublic information concerning a pending tender offer that he knows or has reason to know has been acquired 'directly or indirectly' from an insider of the offeror or issuer, or someone working on their behalf. Rule 14e–3(a) is a disclosure provision. It creates a duty in those traders who fall within its ambit to abstain or disclose, *without regard to whether the trader owes a pre-existing fiduciary duty* to respect the confidentiality of the information." *United States* v. *Chestman,* 947 F. 2d 551, 557 (1991) (en banc) (emphasis added), cert. denied, 503 U. S. 1004 (1992).

See also *SEC* v. *Maio,* 51 F. 3d 623, 635 (CA7 1995) ("Rule 14e–3 creates a duty to disclose material non-public information, or abstain from trading in stocks implicated by an impending tender offer, *regardless of whether such information was obtained through a breach of fiduciary duty.*" (emphasis added)); *SEC* v. *Peters,* 978 F. 2d 1162, 1165 (CA10 1992) (as written, Rule 14e–3(a) has no fiduciary duty requirement).

In the Eighth Circuit's view, because Rule 14e–3(a) applies whether or not the trading in question breaches a fiduciary duty, the regulation exceeds the SEC's § 14(e) rulemaking authority. See 92 F. 3d, at 624, 627. Contra, *Maio,* 51 F. 3d, at 634–635 (CA7); *Peters,* 978 F. 2d, at 1165–1167 (CA10);

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[15] The Rule thus adopts for the tender offer context a requirement resembling the one Chief Justice Burger would have adopted in *Chiarella* for misappropriators under § 10(b). See *supra,* at 655, n. 6.

Chestman, 947 F. 2d, at 556–563 (CA2) (all holding Rule 14e–3(a) a proper exercise of SEC's statutory authority). In support of its holding, the Eighth Circuit relied on the text of § 14(e) and our decisions in *Schreiber* and *Chiarella.* See 92 F. 3d, at 624–627.

The Eighth Circuit homed in on the essence of § 14(e)'s rulemaking authorization: "[T]he statute empowers the SEC to 'define' and 'prescribe means reasonably designed to prevent' 'acts and practices' which are 'fraudulent.'" *Id.,* at 624. All that means, the Eighth Circuit found plain, is that the SEC may "identify and regulate," in the tender offer context, "acts and practices" the law already defines as "fraudulent"; but, the Eighth Circuit maintained, the SEC may not "create its own definition of fraud." *Ibid.* (internal quotation marks omitted).

This Court, the Eighth Circuit pointed out, held in *Schreiber* that the word "manipulative" in the § 14(e) phrase "fraudulent, deceptive, or manipulative acts or practices" means just what the word means in § 10(b): Absent misrepresentation or nondisclosure, an act cannot be indicted as manipulative. See 92 F. 3d, at 625 (citing *Schreiber,* 472 U. S., at 7–8, and n. 6). Section 10(b) interpretations guide construction of § 14(e), the Eighth Circuit added, see 92 F. 3d, at 625, citing this Court's acknowledgment in *Schreiber* that § 14(e)'s "'broad antifraud prohibition' . . . [is] modeled on the antifraud provisions of § 10(b) . . . and Rule 10b–5," 472 U. S., at 10 (citation omitted); see *id.,* at 10–11, n. 10.

For the meaning of "fraudulent" under § 10(b), the Eighth Circuit looked to *Chiarella.* See 92 F. 3d, at 625. In that case, the Eighth Circuit recounted, this Court held that a failure to disclose information could be "fraudulent" under § 10(b) only when there was a duty to speak arising out of "'a fiduciary or other similar relation of trust and confidence.'" *Chiarella,* 445 U. S., at 228 (quoting Restatement (Second) of Torts § 551(2)(a) (1976)). Just as § 10(b) demands a showing of a breach of fiduciary duty, so such a breach is necessary to make out a § 14(e) violation, the Eighth Circuit concluded.

As to the Commission's § 14(e) authority to "prescribe means reasonably designed to prevent" fraudulent acts, the Eighth Circuit stated: "Properly read, this provision means simply that the SEC has broad regulatory powers in the field of tender offers, but the statutory terms have a fixed meaning which the SEC cannot alter by way of an administrative rule." 92 F. 3d, at 627.

The United States urges that the Eighth Circuit's reading of § 14(e) misapprehends both the Commission's authority to define fraudulent acts and the Commission's power to prevent them. "The 'defining' power," the United States submits, "would be a virtual nullity were the SEC not permitted to go beyond common law fraud (which is separately prohibited in the first [self-operative] sentence of Section 14(e))." Brief for United States 11; see *id.*, at 37.

In maintaining that the Commission's power to define fraudulent acts under § 14(e) is broader than its rulemaking power under § 10(b), the United States questions the Court of Appeals' reading of *Schreiber.* See Brief for United States 38–40. Parenthetically, the United States notes that the word before the *Schreiber* Court was "manipulative"; unlike "fraudulent," the United States observes, "'manipulative' . . . is 'virtually a term of art when used in connection with the securities markets.'" Brief for United States 38, n. 20 (quoting *Schreiber,* 472 U. S., at 6). Most tellingly, the United States submits, *Schreiber* involved acts alleged to violate the self-operative provision in § 14(e)'s first sentence, a sentence containing language similar to § 10(b). But § 14(e)'s second sentence, containing the rulemaking authorization, the United States points out, does not track § 10(b), which simply authorizes the SEC to proscribe "manipulative or deceptive device[s] or contrivance[s]." Brief for United States 38. Instead, § 14(e)'s rulemaking prescription tracks § 15(c)(2)(D) of the Exchange Act, 15 U. S. C. § 78*o*(c)(2)(D), which concerns the conduct of broker-dealers in over-the-counter markets. See Brief for United States 38–39. Since 1938, see 52 Stat. 1075, § 15(c)(2) has given the Commission authority to "define, and prescribe means reasonably designed to prevent, such [broker-dealer] acts and practices as are fraudulent, deceptive, or manipulative." 15 U. S. C. § 78*o*(c)(2)(D). When Congress added this same rulemaking language to § 14(e) in 1970, the Government states, the Commission had already used its § 15(c)(2) authority to reach beyond common-law fraud. See Brief for United States 39, n. 22.[16]

We need not resolve in this case whether the Commission's authority under § 14(e) to "define . . . such acts and practices as are fraudulent" is broader than the Commission's fraud-defining authority under § 10(b), for we agree with the United States that Rule 14e–3(a), as applied to cases of this genre, qualifies under § 14(e) as a "means reasonably designed to prevent" fraudulent trading on material, nonpublic information in the tender offer context.[17] A prophylactic measure, because its mission is to prevent, typically encompasses more than the core activity prohibited. As we noted in *Schreiber,* § 14(e)'s rulemaking authorization gives the Commission "latitude," even in the context of a term of art like "manipulative," "to regulate nondeceptive activities as a 'reasonably designed' means of preventing manipulative acts, without suggesting any change in the meaning of the term 'manipulative' itself." 472 U. S., at 11, n. 11. We hold, accordingly, that under § 14(e), the Commission may prohibit acts not themselves fraudulent under the common law or § 10(b), if the prohibition is "reasonably designed to prevent . . . acts and practices [that] are fraudulent." 15 U. S. C. § 78n(e).[18]

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[16] The Government draws our attention to the following measures: 17 CFR § 240.15c2–1 (1970) (prohibiting a broker-dealer's hypothecation of a customer's securities if hypothecated securities would be commingled with the securities of another customer, absent written consent); § 240.15c2–3 (prohibiting transactions by broker-dealers in unvalidated German securities); § 240.15c2–4 (prohibiting broker-dealers from accepting any part of the sale price of a security being distributed unless the money received is promptly transmitted to the persons entitled to it); § 240.15c2–5 (requiring broker-dealers to provide written disclosure of credit terms and commissions in connection with securities sales in which broker-dealers extend credit, or participate in arranging for loans, to the purchasers). See Brief for United States 39, n. 22.

[17] We leave for another day, when the issue requires decision, the legitimacy of Rule 14e–3(a) as applied to "warehousing," which the Government describes as "the practice by which bidders leak advance information of a tender offer to allies and encourage them to purchase the target company's stock before the bid is announced." Reply Brief 17. As we observed in *Chiarella*, one of the Commission's purposes in proposing Rule 14e–3(a)

Because Congress has authorized the Commission, in § 14(e), to prescribe legislative rules, we owe the Commission's judgment "more than mere deference or weight." *Batterton* v. *Francis,* 432 U. S. 416, 424–426 (1977). Therefore, in determining whether Rule 14e–3(a)'s "disclose or abstain from trading" requirement is reasonably designed to prevent fraudulent acts, we must accord the Commission's assessment "controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837, 844 (1984). In this case, we conclude, the Commission's assessment is none of these.[19]

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was "to bar warehousing under its authority to regulate tender offers." 445 U. S., at 234. The Government acknowledges that trading authorized by a principal breaches no fiduciary duty. See Reply Brief 17. The instant case, however, does not involve trading authorized by a principal; therefore, we need not here decide whether the Commission's proscription of warehousing falls within its § 14(e) authority to define or prevent fraud.

[18] The Commission's power under § 10(b) is more limited. See *supra,* at 651 (Rule 10b–5 may proscribe only conduct that § 10(b) prohibits).

[19] JUSTICE THOMAS' dissent urges that the Commission must be precise about the authority it is exercising—that it must say whether it is acting to "define" or to "prevent" fraud—and that in this instance it has pur-

In adopting the "disclose or abstain" rule, the SEC explained:

> "The Commission has previously expressed and continues to have serious concerns about trading by persons in possession of material, nonpublic information relating to a tender offer. This practice results in unfair disparities in market information and market disruption. Security holders who purchase from or sell to such persons are effectively denied the benefits of disclosure and the substantive protections of the Williams Act. If furnished with the information, these security holders would be able to make an informed investment decision, which could involve deferring the purchase or sale of the securities until the material information had been disseminated or until the tender offer had been commenced or terminated." 45 Fed. Reg. 60412 (1980) (footnotes omitted).

The Commission thus justified Rule 14e–3(a) as a means necessary and proper to assure the efficacy of Williams Act protections.

The United States emphasizes that Rule 14e–3(a) reaches trading in which "a breach of duty is likely but difficult to prove." Reply Brief 16. "Particularly in the context of a tender offer," as the Tenth Circuit recognized, "there is a fairly wide circle of people with confidential information," *Peters*, 978 F. 2d, at 1167, notably, the attorneys, investment

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ported only to define, not to prevent. See *post*, at 696. JUSTICE THOMAS sees this precision in Rule 14e–3(a)'s words: "it shall constitute a fraudulent . . . act . . . within the meaning of section 14(e) . . . ." We do not find the Commission's Rule vulnerable for failure to recite as a regulatory preamble: We hereby exercise our authority to "define, and prescribe means reasonably designed to prevent, . . . [fraudulent] acts." Sensibly read, the Rule is an exercise of the Commission's full authority. Logically and practically, such a rule may be conceived and defended, alternatively, as definitional or preventive.

bankers, and accountants involved in structuring the transaction. The availability of that information may lead to abuse, for "even a hint of an upcoming tender offer may send the price of the target company's stock soaring." *SEC* v. *Materia,* 745 F. 2d 197, 199 (CA2 1984). Individuals entrusted with nonpublic information, particularly if they have no long-term loyalty to the issuer, may find the temptation to trade on that information hard to resist in view of "the very large short-term profits potentially available [to them]." *Peters,* 978 F. 2d, at 1167.

"[I]t may be possible to prove circumstantially that a person [traded on the basis of material, nonpublic information], but almost impossible to prove that the trader obtained such information in breach of a fiduciary duty owed either by the trader or by the ultimate insider source of the information." *Ibid.* The example of a "tippee" who trades on information received from an insider illustrates the problem. Under Rule 10b–5, "a tippee assumes a fiduciary duty to the shareholders of a corporation not to trade on material nonpublic information only when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach." *Dirks,* 463 U. S., at 660. To show that a tippee who traded on nonpublic information about a tender offer had breached a fiduciary duty would require proof not only that the insider source breached a fiduciary duty, but that the tippee knew or should have known of that breach. "Yet, in most cases, the only parties to the [information transfer] will be the insider and the alleged tippee." *Peters,* 978 F. 2d, at 1167.[20]

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[20] JUSTICE THOMAS opines that there is no reason to anticipate difficulties in proving breach of duty in "misappropriation" cases. "Once the source of the [purloined] information has been identified," he asserts, "it should be a simple task to obtain proof of any breach of duty." *Post,* at 697. To test that assertion, assume a misappropriating partner at Dor-

In sum, it is a fair assumption that trading on the basis of material, nonpublic information will often involve a breach of a duty of confidentiality to the bidder or target company or their representatives. The SEC, cognizant of the proof problem that could enable sophisticated traders to escape responsibility, placed in Rule 14e–3(a) a "disclose or abstain from trading" command that does not require specific proof of a breach of fiduciary duty. That prescription, we are satisfied, applied to this case, is a "means reasonably designed to prevent" fraudulent trading on material, nonpublic information in the tender offer context. See *Chestman*, 947 F. 2d, at 560 ("While dispensing with the subtle problems of proof associated with demonstrating fiduciary breach in the problematic area of tender offer insider trading, [Rule 14e–3(a)] retains a close nexus between the prohibited conduct and the statutory aims."); accord, *Maio*, 51 F. 3d, at 635, and n. 14; *Peters*, 978 F. 2d, at 1167.[21] Therefore, insofar as it serves to prevent the type of misappropriation charged against O'Hagan, Rule 14e–3(a) is a proper exercise of the Commission's prophylactic power under § 14(e).[22]

As an alternate ground for affirming the Eighth Circuit's judgment, O'Hagan urges that Rule 14e–3(a) is invalid be-

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sey & Whitney told his daughter or son and a wealthy friend that a tender for Pillsbury was in the offing, and each tippee promptly purchased Pillsbury stock, the child borrowing the purchase price from the wealthy friend. JUSTICE THOMAS' confidence, *post*, at 698, n. 12, that "there is no reason to suspect that the tipper would gratuitously protect the tippee," seems misplaced.

[21] JUSTICE THOMAS insists that even if the misappropriation of information from the bidder about a tender offer is fraud, the Commission has not explained why such fraud is "in connection with" a tender offer. *Post*, at 697, 698. What else, one can only wonder, might such fraud be "in connection with"?

[22] Repeating the argument it made concerning the misappropriation theory, see *supra*, at 665, n. 11, the United States urges that Congress confirmed Rule 14e–3(a)'s validity in ITSFEA, 15 U. S. C. § 78u–1. See Brief for United States 44–45. We uphold Rule 14e–3(a) on the basis of § 14(e) itself and need not address ITSFEA's relevance to this case.

cause it prohibits trading in advance of a tender offer—when "a substantial step . . . to commence" such an offer has been taken—while § 14(e) prohibits fraudulent acts "in connection with any tender offer." See Brief for Respondent 41–42. O'Hagan further contends that, by covering pre-offer conduct, Rule 14e–3(a) "fails to comport with due process on two levels": The Rule does not "give fair notice as to when, in advance of a tender offer, a violation of § 14(e) occurs," *id.*, at 42; and it "disposes of any scienter requirement," *id.*, at 43. The Court of Appeals did not address these arguments, and O'Hagan did not raise the due process points in his briefs before that court. We decline to consider these contentions in the first instance.[23] The Court of Appeals may address on remand any arguments O'Hagan has preserved.

IV

Based on its dispositions of the securities fraud convictions, the Court of Appeals also reversed O'Hagan's convictions, under 18 U. S. C. § 1341, for mail fraud. See 92 F. 3d, at 627–628. Reversal of the securities convictions, the Court of Appeals recognized, "d[id] not as a matter of law require that the mail fraud convictions likewise be reversed." *Id.*, at 627 (citing *Carpenter*, 484 U. S., at 24, in which this Court unanimously affirmed mail and wire fraud convictions based on the same conduct that evenly divided the Court on the defendants' securities fraud convictions). But in this case, the Court of Appeals said, the indictment was so structured that the mail fraud charges could not be disassociated from the securities fraud charges, and absent any securities fraud, "there was no fraud upon which to base the mail fraud charges." 92 F. 3d, at 627–628.[24]

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[23] As to O'Hagan's scienter argument, we reiterate that 15 U. S. C. § 78ff(a) requires the Government to prove "willful[l] violat[ion]" of the securities laws, and that lack of knowledge of the relevant rule is an affirmative defense to a sentence of imprisonment. See *supra*, at 665–666.

The United States urges that the Court of Appeals' position is irreconcilable with *Carpenter:* Just as in *Carpenter,* so here, the "mail fraud charges are independent of [the] securities fraud charges, even [though] both rest on the same set of facts." Brief for United States 46–47. We need not linger over this matter, for our rulings on the securities fraud issues require that we reverse the Court of Appeals judgment on the mail fraud counts as well.[25]

O'Hagan, we note, attacked the mail fraud convictions in the Court of Appeals on alternate grounds; his other arguments, not yet addressed by the Eighth Circuit, remain open for consideration on remand.

* * *

The judgment of the Court of Appeals for the Eighth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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[24] The Court of Appeals reversed respondent's money laundering convictions on similar reasoning. See 92 F. 3d, at 628. Because the United States did not seek review of that ruling, we leave undisturbed that portion of the Court of Appeals' judgment.

[25] JUSTICE THOMAS finds O'Hagan's convictions on the mail fraud counts, but not on the securities fraud counts, sustainable. *Post,* at 700–701. Under his view, securities traders like O'Hagan would escape SEC civil actions and federal prosecutions under legislation targeting securities fraud, only to be caught for their trading activities in the broad mail fraud net. If misappropriation theory cases could proceed only under the federal mail and wire fraud statutes, practical consequences for individual defendants might not be large, see Aldave, 49 Ohio St. L. J., at 381, and n. 60; however, "proportionally more persons accused of insider trading [might] be pursued by a U. S. Attorney, and proportionally fewer by the SEC," *id.,* at 382. Our decision, of course, does not rest on such enforcement policy considerations.

JUSTICE SCALIA, concurring in part and dissenting in part.

I join Parts I, III, and IV of the Court's opinion. I do not agree, however, with Part II of the Court's opinion, containing its analysis of respondent's convictions under § 10(b) and Rule 10b–5.

I do not entirely agree with JUSTICE THOMAS's analysis of those convictions either, principally because it seems to me irrelevant whether the Government's theory of why respondent's acts were covered is "coherent and consistent," *post*, at 691. It is true that with respect to matters over which an agency has been accorded adjudicative authority or policymaking discretion, the agency's action must be supported by the reasons that the agency sets forth, *SEC* v. *Chenery Corp.*, 318 U. S. 80, 94 (1943); see also *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196 (1947), but I do not think an agency's unadorned application of the law need be, at least where (as here) no *Chevron* deference is being given to the agency's interpretation, see *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). In point of fact, respondent's actions either violated § 10(b) and Rule 10b–5, or they did not—regardless of the reasons the Government gave. And it is for us to decide.

While the Court's explanation of the scope of § 10(b) and Rule 10b–5 would be entirely reasonable in some other context, it does not seem to accord with the principle of lenity we apply to criminal statutes (which cannot be mitigated here by the Rule, which is no less ambiguous than the statute). See *Reno* v. *Koray*, 515 U. S. 50, 64–65 (1995) (explaining circumstances in which rule of lenity applies); *United States* v. *Bass*, 404 U. S. 336, 347–348 (1971) (discussing policies underlying rule of lenity). In light of that principle, it seems to me that the unelaborated statutory language: "[t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance," § 10(b), must be construed to require the manipulation or deception of a party to a securities transaction.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE joins, concurring in the judgment in part and dissenting in part.

Today the majority upholds respondent's convictions for violating § 10(b) of the Securities Exchange Act of 1934, and Rule 10b–5 promulgated thereunder, based upon the Securities and Exchange Commission's "misappropriation theory." Central to the majority's holding is the need to interpret § 10(b)'s requirement that a deceptive device be "use[d] or employ[ed], in connection with the purchase or sale of any security." 15 U. S. C. § 78j(b). Because the Commission's misappropriation theory fails to provide a coherent and consistent interpretation of this essential requirement for liability under § 10(b), I dissent.

The majority also sustains respondent's convictions under § 14(e) of the Securities Exchange Act, and Rule 14e–3(a) promulgated thereunder, regardless of whether respondent violated a fiduciary duty to anybody. I dissent too from that holding because, while § 14(e) does allow regulations prohibiting nonfraudulent acts as a prophylactic against certain fraudulent acts, neither the majority nor the Commission identifies any relevant underlying fraud against which Rule 14e–3(a) reasonably provides prophylaxis. With regard to respondent's mail fraud convictions, however, I concur in the judgment of the Court.

I

I do not take issue with the majority's determination that the undisclosed misappropriation of confidential information by a fiduciary can constitute a "deceptive device" within the meaning of § 10(b). Nondisclosure where there is a preexisting duty to disclose satisfies our definitions of fraud and deceit for purposes of the securities laws. See *Chiarella* v. *United States*, 445 U. S. 222, 230 (1980).

Unlike the majority, however, I cannot accept the Commission's interpretation of when a deceptive device is "use[d] . . . in connection with" a securities transaction. Although the Commission and the majority at points seem to suggest that *any* relation to a securities transaction satisfies the "in connection with" requirement of § 10(b), both ultimately reject such an overly expansive construction and require a more integral connection between the fraud and the securities transaction. The majority states, for example, that the misappropriation theory applies to undisclosed misappropriation of confidential information "for securities trading purposes," *ante,* at 652, thus seeming to require a particular intent by the misappropriator in order to satisfy the "in connection with" language. See also *ante,* at 656 (the "misappropriation theory targets information of a sort that misappropriators *ordinarily* capitalize upon to gain no-risk profits through the purchase or sale of securities" (emphasis added)); *ante,* at 656–657 (distinguishing embezzlement of money used to buy securities as lacking the requisite connection). The Commission goes further, and argues that the misappropriation theory satisfies the "in connection with" requirement because it "depends on an *inherent* connection between the deceptive conduct and the purchase or sale of a security." Brief for United States 21 (emphasis added); see also *ibid.* (the "misappropriated information had personal value to respondent *only* because of its utility in securities trading" (emphasis added)).

The Commission's construction of the relevant language in § 10(b), and the incoherence of that construction, become evident as the majority attempts to describe why the fraudulent theft of information falls under the Commission's misappropriation theory, but the fraudulent theft of money does not. The majority correctly notes that confidential information "qualifies as property to which the company has a right of exclusive use." *Ante,* at 654. It then observes that the "undisclosed misappropriation of such information, in violation of a fiduciary duty, . . . constitutes fraud akin to embezzlement—the fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another."

Ibid. (citations and internal quotation marks omitted).[1] So far the majority's analogy to embezzlement is well taken, and adequately demonstrates that undisclosed misappropriation can be a fraud on the source of the information.

What the embezzlement analogy does not do, however, is explain how the relevant fraud is "use[d] or employ[ed], in connection with" a securities transaction. And when the majority seeks to distinguish the embezzlement of funds from the embezzlement of information, it becomes clear that neither the Commission nor the majority has a coherent theory regarding § 10(b)'s "in connection with" requirement.

Turning first to why embezzlement of information supposedly meets the "in connection with" requirement, the majority asserts that the requirement

> "is satisfied because the fiduciary's fraud is consummated, not when the fiduciary gains the confidential information, but when, without disclosure to his principal, he uses the information to purchase or sell securities. The securities transaction and the breach of duty thus coincide." *Ante,* at 656.

The majority later notes, with apparent approval, the Government's contention that the embezzlement of funds used to purchase securities would *not* fall within the misappropriation theory. *Ante,* at 656–657 (citing Brief for United States 24, n. 13). The misappropriation of funds used for a securities transaction is not covered by its theory, the Government explains, because "the proceeds would have value to the malefactor apart from their use in a securities transaction, and the fraud would be complete as soon as the money was obtained." Brief for United States 24, n. 13; see *ante,* at 656 (quoting Government's explanation).

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[1] Of course, the "use" to which one puts misappropriated property need not be one designed to bring profit to the misappropriator: Any "fraudulent appropriation to one's own use" constitutes embezzlement, regardless of what the embezzler chooses to do with the money. See, *e. g., Logan* v. *State,* 493 P. 2d 842, 846 (Okla. Crim. App. 1972) ("Any diversion of funds held in trust constitutes embezzlement whether there is direct personal benefit or not as long as the owner is deprived of his money").

Accepting the Government's description of the scope of its own theory, it becomes plain that the majority's explanation of how the misappropriation theory supposedly satisfies the "in connection with" requirement is incomplete. The touchstone required for an embezzlement to be "use[d] or employ[ed], in connection with" a securities transaction is not merely that it "coincide" with, or be consummated by, the transaction, but that it is *necessarily* and *only* consummated by the transaction. Where the property being embezzled has value "apart from [its] use in a securities transaction"—even though it is in fact being used in a securities transaction—the Government contends that there is no violation under the misappropriation theory.

My understanding of the Government's proffered theory of liability, and its construction of the "in connection with" requirement, is confirmed by the Government's explanation during oral argument:

> "[Court]: What if I appropriate some of my client's money in order to buy stock?
>
> . . . . .
>
> "[Court]: Have I violated the securities laws?
>
> "[Counsel]: I do not think that you have.
>
> "[Court]: Why not? Isn't that in connection with the purchase of securit[ies] just as much as this one is?
>
> "[Counsel]: It's not just as much as this one is, because in this case it is the use of the information that enables the profits, pure and simple. There would be no opportunity to engage in profit—
>
> "[Court]: Same here. I didn't have the money. The only way I could buy this stock was to get the money.
>
> . . . . .
>
> "[Counsel]: The difference . . . is that once you have the money you can do anything you want with it. In a sense, the fraud is complete at that point, and then you

> go on and you can use the money to finance any number of other activities, but *the connection is far less close than in this case, where the only value of this information for personal profit for respondent was to take it and profit in the securities markets by trading on it.*
>
> . . . . .
>
> "[Court]: So what you're saying is, is in this case the misappropriation can only be of relevance, or is of substantial relevance, is with reference to the purchase of securities.
>
> "[Counsel]: Exactly.
>
> "[Court]: When you take the money out of the accounts you can go to the racetrack, or whatever.
>
> "[Counsel]: That's exactly right, and because of that difference, [there] can be no doubt that this kind of misappropriation of property is in connection with the purchase or sale of securities.
>
> "Other kinds of misappropriation of property may or may not, but this is a unique form of fraud, unique to the securities markets, in fact, because *the only way in which respondent could have profited through this information is by either trading on it or by tipping somebody else to enable their trades.*" Tr. of Oral Arg. 16–19 (emphases added).

As the above exchange demonstrates, the relevant distinction is not that the misappropriated information *was* used for a securities transaction (the money example met that test), but rather that it could *only* be used for such a transaction. See also *id.*, at 6–7 (Government contention that the misappropriation theory satisfies "the requisite connection between the fraud and the securities trading, because it is *only* in the trading that the fraud is consummated" (emphasis added)); *id.*, at 8 (same).

The Government's construction of the "in connection with" requirement—and its claim that such requirement precludes coverage of financial embezzlement—also demonstrates how the majority's described distinction of financial embezzlement is incomplete. Although the majority claims that the fraud in a financial embezzlement case is complete as soon as the money is obtained, and before the securities transaction is consummated, that is not uniformly true, and thus cannot be the Government's basis for claiming that such embezzlement does not violate the securities laws. It is not difficult to imagine an embezzlement of money that takes place via the mechanism of a securities transaction—for example where a broker is directed to purchase stock for a client and instead purchases such stock—using client funds—for his own account. The unauthorized (and presumably undisclosed) transaction is the very act that constitutes the embezzlement and the "securities transaction and the breach of duty thus coincide." What presumably distinguishes monetary embezzlement for the Government is thus that it is not *necessarily* coincident with a securities transaction, not that it *never* lacks such a "connection."

Once the Government's construction of the misappropriation theory is accurately described and accepted—along with its implied construction of § 10(b)'s "in connection with" language—that theory should no longer cover cases, such as this one, involving fraud on the source of information where the source has no connection with the other participant in a securities transaction. It seems obvious that the undisclosed misappropriation of confidential information is not necessarily consummated by a securities transaction. In this case, for example, upon learning of Grand Met's confidential takeover plans, O'Hagan could have done any number of things with the information: He could have sold it to a newspaper for publication, see *id.*, at 36; he could have given or sold the information to Pillsbury itself, see *id.*, at 37; or he could even have kept the information and used it solely for his personal amusement, perhaps in a fantasy stock trading game.

Any of these activities would have deprived Grand Met of its right to "exclusive use," *ante*, at 654, of the information and, if undisclosed, would constitute "embezzlement" of Grand Met's informational property. Under *any* theory of liability, however, these activities would not violate § 10(b) and, according to the Commission's monetary embezzlement analogy, these possibilities are sufficient to preclude a violation under the misappropriation theory even where the informational property *was* used for securities trading. That O'Hagan actually did use the information to purchase securities is thus no more significant here than it is in the case of embezzling money used to purchase securities. In both cases the embezzler *could have* done something else with the property, and hence the Commission's necessary "connection" under the securities laws would not be met.[2] If the relevant test under the "in connection with" language is whether the fraudulent act is *necessarily* tied to a securities transaction, then the misappropriation of confidential information used to trade no more violates § 10(b) than does the misappropriation of funds used to trade. As the Commission concedes that the latter is not covered under its theory, I am at a loss to see how the same theory can coherently be applied to the former.[3]

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[2] Indeed, even if O'Hagan or someone else thereafter used the information to trade, the misappropriation would have been complete before the trade and there should be no § 10(b) liability. The most obvious real-world example of this scenario would be if O'Hagan had simply tipped someone else to the information. The mere act of passing the information along would have violated O'Hagan's fiduciary duty and, if undisclosed, would be an "embezzlement" of the confidential information, regardless of whether the tippee later traded on the information.

[3] The majority is apparently unimpressed by the example of a misappropriator using embezzled information for personal amusement in a fantasy stock trading game, finding no need for the Commission to "inhibit" such recreational uses. *Ante,* at 657, n. 8. This argument, of course, misses the point of the example. It is not that such a use does or should violate the securities laws yet is not covered by the Commission's theory; rather, the example shows that the misappropriation of information is not "only" or "inherently" tied to securities trading, and hence the misappropriation

The majority makes no attempt to defend the misappropriation theory as set forth by the Commission. Indeed, the majority implicitly concedes the indefensibility of the Commission's theory by acknowledging that alternative uses of misappropriated information exist that do not violate the securities laws and then dismissing the Government's repeated explanations of its misappropriation theory as mere "overstatement." *Ante*, at 657. Having rejected the Government's description of its theory, the majority then engages in the "imaginative" exercise of constructing its own misappropriation theory from whole cloth. Thus, we are told, if we merely "[s]ubstitute 'ordinarily' for 'only'" when describing the degree of connectedness between a misappropriation and a securities transaction, the Government would have a winner. *Ibid.* Presumably, the majority would similarly edit the Government's brief to this Court to argue for only an "ordinary," rather than an "*inherent* connection between the deceptive conduct and the purchase or sale of a security." Brief for United States 21 (emphasis added).

I need not address the coherence, or lack thereof, of the majority's new theory, for it suffers from a far greater, and dispositive, flaw: It is not the theory offered by the Commission. Indeed, as far as we know from the majority's opinion, this new theory has *never* been proposed by the Commission, much less adopted by rule or otherwise. It is a fundamental proposition of law that this Court "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983). We do not even credit a "*post hoc* rationalizatio[n]" of counsel for the agency, *id.*, at 50, so one is left to wonder how we could possibly rely on a *post hoc* rationaliza-

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of information, *whatever its ultimate use,* fails the Commission's own test under the "in connection with" requirement of § 10(b) and Rule 10b–5.

tion invented by this Court and never even presented by the Commission for our consideration.

Whether the majority's new theory has merit, we cannot possibly tell on the record before us. There are no findings regarding the "ordinary" use of misappropriated information, much less regarding the "ordinary" use of other forms of embezzled property. The Commission has not opined on the scope of the new requirement that property must "ordinarily" be used for securities trading in order for its misappropriation to be "in connection with" a securities transaction. We simply do not know what would or would not be covered by such a requirement, and hence cannot evaluate whether the requirement embodies a consistent and coherent interpretation of the statute.[4] Moreover, persons subject to this new theory, such as respondent here, surely could not and cannot regulate their behavior to comply with the new theory because, until today, the theory has never existed. In short, the majority's new theory is simply not presented by this case, and cannot form the basis for upholding respondent's convictions.

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[4] Similarly, the majority's assertion that the alternative uses of misappropriated information are not as profitable as use in securities trading, *ante*, at 657, n. 8, is speculative at best. We have no idea what is the best or most profitable use of misappropriated information, either in this case or generally. We likewise have no idea what is the best use of other forms of misappropriated property, and it is at least conceivable that the best use of embezzled money, or securities themselves, is for securities trading. If the use of embezzled money to purchase securities is "sufficiently detached," *ante*, at 657, from a securities transaction, then I see no reason why the non-"inherent" use of information for securities trading is not also "sufficiently detached" under the Government's theory. In any event, I am at a loss to find in the statutory language any hint of a "best-use" requirement for setting the requisite connection between deception and the purchase or sale of securities.

The majority's further claim that it is unremarkable that "a rule suitably applied to the fraudulent uses of certain kinds of information would be stretched beyond reason were it applied to the fraudulent use of money," *ibid.*, is itself remarkable given that the only existing "rule" is Rule 10b–5, which nowhere confines itself to information and, indeed, does not even contain the word. And given that the only "reason" offered by the Government in support of its misappropriation theory applies (or fails to apply) equally to money or to information, the application of the Government's theory in this case is no less "beyond reason" than it would be as applied to financial embezzlement.

In upholding respondent's convictions under the new and improved misappropriation theory, the majority also points to various policy considerations underlying the securities laws, such as maintaining fair and honest markets, promoting investor confidence, and protecting the integrity of the securities markets. *Ante*, at 657, 658–659. But the repeated reliance on such broad-sweeping legislative purposes reaches too far and is misleading in the context of the misappropriation theory. It reaches too far in that, regardless of the overarching purpose of the securities laws, it is not illegal to run afoul of the "purpose" of a statute, only its letter. The majority's approach is misleading in this case because it glosses over the fact that the supposed threat to fair and honest markets, investor confidence, and market integrity comes not from the supposed fraud in this case, but from the mere fact that the information used by O'Hagan was nonpublic.

As the majority concedes, because "the deception essential to the misappropriation theory involves feigning fidelity to the source of information, if the fiduciary discloses *to the source* that he plans to trade on the nonpublic information, there is no 'deceptive device' and thus no § 10(b) violation." *Ante*, at 655 (emphasis added). Indeed, were the source expressly to authorize its agents to trade on the confidential information—as a perk or bonus, perhaps—there would likewise be no § 10(b) violation.[5] Yet in either case—disclosed misuse or authorized use—the hypothesized "inhibiting impact on market participation," *ante*, at 659, would be identical to that from behavior violating the misappropriation theory: "Outsiders" would still be trading based on nonpublic information that the average investor has no hope of obtaining through his own diligence.[6]

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[5] See Tr. of Oral Arg. 9 (Government conceding that, "just as in [*Carpenter* v. *United States*, 484 U. S. 19 (1987)], if [the defendant] had gone to the Wall Street Journal and said, look, you know, you're not paying me very much. I'd like to make a little bit more money by buying stock, the stocks

The majority's statement that a "misappropriator who trades on the basis of material, nonpublic information, in short, *gains his advantageous market position through deception; he deceives the source of the information and simultaneously harms members of the investing public,*" *ante*, at 656 (emphasis added), thus focuses on the wrong point. Even if it is true that trading on nonpublic information hurts the public, it is true whether or not there is any deception of the source of the information.[7] Moreover, as

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that are going to appear in my Heard on the Street column, and the Wall Street Journal said, that's fine, there would have been no deception of the Wall Street Journal").

[6] That the dishonesty aspect of misappropriation might be eliminated via disclosure or authorization is wholly besides the point. The dishonesty in misappropriation is in the relationship between the fiduciary and the principal, not in any relationship between the misappropriator and the market. No market transaction is made more or less honest by disclosure to a third-party principal, rather than to the market as a whole. As far as the market is concerned, a trade based on confidential information is no more "honest" because some third party may know of it so long as those on the other side of the trade remain in the dark.

[7] The majority's statement, by arguing that market advantage is gained "through" deception, unfortunately seems to embrace an error in logic: Conflating causation and correlation. That the misappropriator may both deceive the source and "simultaneously" hurt the public no more shows a causal "connection" between the two than the fact that the sun both gives some people a tan and "simultaneously" nourishes plants demonstrates that melanin production in humans causes plants to grow. In this case, the only element common to the deception and the harm is that both are the result of the same antecedent cause—namely, using nonpublic information. But such use, even for securities trading, is not illegal, and the consequential deception of the source follows an entirely divergent branch of causation than does the harm to the public. The trader thus "gains his

we have repeatedly held, use of nonpublic information to trade is not itself a violation of § 10(b). *E. g., Chiarella,* 445 U. S., at 232–233. Rather, it is the use of fraud "in connection with" a securities transaction that is forbidden. Where the relevant element of fraud has no impact on the integrity of the subsequent transactions as distinct from the nonfraudulent element of using nonpublic information, one can reasonably question whether the fraud was used in connection with a securities transaction. And one can likewise question whether removing that aspect of fraud, though perhaps laudable, has anything to do with the confidence or integrity of the market.

The absence of a coherent and consistent misappropriation theory and, by necessary implication, a coherent and consistent application of the statutory "use or employ, in connection with" language, is particularly problematic in the context of this case. The Government claims a remarkable breadth to the delegation of authority in § 10(b), arguing that "the very aim of this section was to pick up unforeseen, cunning, deceptive devices that people might cleverly use in the securities markets." Tr. of Oral Arg. 7. As the Court aptly queried, "[t]hat's rather unusual, for a criminal statute to be that open-ended, isn't it?" *Ibid.* Unusual indeed. Putting aside the dubious validity of an open-ended delegation to an independent agency to go forth and create regulations criminalizing "fraud," in this case we do not even have a formal regulation embodying the agency's misappropriation theory. Certainly Rule 10b–5 cannot be said to embody the theory—although it deviates from the statutory language by the addition of the words "any person," it merely repeats, unchanged, § 10(b)'s "in connection with" language. Given that the validity of the misappropriation theory turns on the construc-

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advantageous market position *through*" the use of nonpublic information, whether or not deception is involved; the deception has no effect on the existence or extent of his advantage.

tion of that language in § 10(b), the regulatory language is singularly uninformative.[8]

Because we have no regulation squarely setting forth some version of the misappropriation theory as the Commission's interpretation of the statutory language, we are left with little more than the Commission's litigating position or the majority's completely novel theory that is not even acknowledged, much less adopted, by the Commission. As we have noted before, such positions are not entitled to deference and, at most, get such weight as their persuasiveness warrants. *Metropolitan Stevedore Co.* v. *Rambo*, *ante*, at 138, n. 9, 140, n. 10. Yet I find wholly unpersuasive a litigating position by the Commission that, at best, embodies an inconsistent and incoherent interpretation of the relevant statutory language and that does not provide any predictable guidance as to what behavior contravenes the statute. That position is no better than an ad hoc interpretation of statutory language and in my view can provide no basis for liability.

II

I am also of the view that O'Hagan's conviction for violating Rule 14e–3(a) cannot stand. Section 14(e) of the Exchange Act provides, in relevant part:

> "It shall be unlawful for any person . . . to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer . . . . The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means

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[8] That the Commission may purport to be interpreting its own Rule, rather than the statute, cannot provide it any greater leeway where the Rule merely repeats verbatim the statutory language on which the entire question hinges. Furthermore, as even the majority recognizes, Rule 10b–5 may not reach beyond the scope of § 10(b), *ante*, at 651, and thus the Commission is obligated to explain how its theory fits within its interpretation of § 10(b) even if it purports to be interpreting its own derivative rule.

> reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative." 15 U. S. C. § 78n(e).

Pursuant to the rulemaking authority conferred by this section, the Commission has promulgated Rule 14e–3(a), which provides, in relevant part:

> "(a) If any person has taken a substantial step or steps to commence, or has commenced, a tender offer (the 'offering person'), it shall constitute a fraudulent, deceptive or manipulative act or practice within the meaning of section 14(e) of the [Securities Exchange] Act for any other person who is in possession of material information relating to such tender offer which information he knows or has reason to know is nonpublic and which he knows or has reason to know has been acquired directly or indirectly from:
>
> "(1) The offering person,
>
> "(2) The issuer of the securities sought or to be sought by such tender offer, or
>
> "(3) [Any person acting on behalf of the offering person or such issuer], to purchase or sell [any such securities or various instruments related to such securities], unless within a reasonable time prior to any purchase or sale such information and its source are publicly disclosed by press release or otherwise." 17 CFR § 240.14e–3(a) (1996).

As the majority acknowledges, Rule 14e–3(a) prohibits a broad range of behavior regardless of whether such behavior is fraudulent under our precedents. See *ante*, at 669 (Rule applies " 'without regard to whether the trader owes a preexisting fiduciary duty to respect the confidentiality of the information' " (emphasis deleted)) (quoting *United States* v. *Chestman*, 947 F. 2d 551, 557 (CA2 1991) (en banc), cert. denied, 503 U. S. 1004 (1992)).

The Commission offers two grounds in defense of Rule 14e–3(a). First, it argues that § 14(e) delegates to the Commission the authority to "define" fraud differently than that concept has been defined by this Court, and that Rule 14e–3(a) is a valid exercise of that "defining" power. Second, it argues that § 14(e) authorizes the Commission to "prescribe means reasonably designed to prevent" fraudulent acts, and that Rule 14e–3(a) is a prophylactic rule that may prohibit nonfraudulent acts as a means of preventing fraudulent acts that are difficult to detect or prove.

The majority declines to reach the Commission's first justification, instead sustaining Rule 14e–3(a) on the ground that

> "under § 14(e), the Commission may prohibit acts not themselves fraudulent under the common law or § 10(b), if the prohibition is 'reasonably designed to prevent . . . acts and practices [that] are fraudulent.'" *Ante,* at 673 (quoting 15 U. S. C. § 78n(e)).

According to the majority, prohibiting trading on nonpublic information is necessary to prevent such supposedly hard-to-prove fraudulent acts and practices as trading on information obtained from the buyer in breach of a fiduciary duty, *ante,* at 675, and possibly "warehousing," whereby the buyer tips allies prior to announcing the tender offer and encourages them to purchase the target company's stock, *ante,* at 672–673, n. 17.[9]

I find neither of the Commission's justifications for Rule 14e–3(a) acceptable in misappropriation cases. With regard to the Commission's claim of authority to redefine the concept of fraud, I agree with the Eighth Circuit that the Commission misreads the relevant provision of § 14(e).

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[9] Although the majority leaves open the possibility that Rule 14e–3(a) may be justified as a means of preventing "warehousing," it does not rely on that justification to support its conclusion in this case. Suffice it to say that the Commission itself concedes that warehousing does not involve fraud as defined by our cases, see Reply Brief for United States 17, and thus preventing warehousing cannot serve to justify Rule 14e–3(a).

> "Simply put, the enabling provision of § 14(e) permits the SEC to identify and regulate those 'acts and practices' which fall within the § 14(e) legal definition of 'fraudulent,' but it does not grant the SEC a license to redefine the term." 92 F. 3d 612, 624 (1996).

This conclusion follows easily from our similar statement in *Schreiber* v. *Burlington Northern, Inc.*, 472 U. S. 1, 11, n. 11 (1985), that § 14(e) gives the "Commission latitude to regulate nondeceptive activities as a 'reasonably designed' means of preventing manipulative acts, without suggesting any change in the meaning of the term 'manipulative' itself."

Insofar as the Rule 14e–3(a) purports to "define" acts and practices that "are fraudulent," it must be measured against our precedents interpreting the scope of fraud. The majority concedes, however, that Rule 14e–3(a) does not prohibit merely trading in connection with fraudulent nondisclosure, but rather it prohibits trading in connection with *any* nondisclosure, regardless of the presence of a pre-existing duty to disclose. *Ante*, at 669. The Rule thus exceeds the scope of the Commission's authority to define such acts and practices as "are fraudulent."[10]

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[10] Even were § 14(e)'s defining authority subject to the construction given it by the Commission, there are strong constitutional reasons for not so construing it. A law that simply stated "it shall be unlawful to do '*X*', however '*X*' shall be defined by an independent agency," would seem to offer no "intelligible principle" to guide the agency's discretion and would thus raise very serious delegation concerns, even under our current jurisprudence, *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U. S. 394, 409 (1928). See also *Field* v. *Clark*, 143 U. S. 649, 693–694 (1892) (distinguishing between making the law by determining what it shall be, and executing the law by determining facts on which the law's operation depends). The Commission's interpretation of § 14(e) would convert it into precisely the type of law just described. Thus, even if that were a plausible interpretation, our usual practice is to avoid unnecessary interpretations of statutory language that call the constitutionality of the statute into further serious doubt.

Turning to the Commission's second justification for Rule 14e–3(a), although I can agree with the majority that § 14(e) authorizes the Commission to prohibit nonfraudulent acts as a means reasonably designed to prevent fraudulent ones, I cannot agree that Rule 14e–3(a) satisfies this standard. As an initial matter, the Rule, on its face, does not purport to be an exercise of the Commission's prophylactic power, but rather a redefinition of what "constitute[s] a fraudulent, deceptive, or manipulative act or practice within the meaning of § 14(e)." That Rule 14e–3(a) *could have been* "conceived and defended, alternatively, as definitional or preventive," *ante*, at 674, n. 19, misses the point. We evaluate regulations not based on the myriad of explanations that could have been given by the relevant agency, but on those explanations and justifications that were, in fact, given. See *State Farm*, 463 U. S., at 43, 50. Rule 14e–3(a) may not be "[s]ensibly read" as an exercise of "preventive" authority, *ante*, at 674, n. 19; it can only be *differently* so read, contrary to its own terms.

Having already concluded that the Commission lacks the power to redefine fraud, the regulation cannot be sustained on its own reasoning. This would seem a complete answer to whether the Rule is valid because, while we might give deference to the Commission's regulatory constructions of § 14(e), the reasoning used by the regulation itself is in this instance contrary to law and we need give no deference to the Commission's *post hoc* litigating justifications not reflected in the regulation.

Even on its own merits, the Commission's prophylactic justification fails. In order to be a valid prophylactic regulation, Rule 14e–3(a) must be reasonably designed not merely to prevent *any* fraud, but to prevent persons from engaging in "fraudulent, deceptive, or manipulative acts or practices, *in connection with* any tender offer." 15 U. S. C. § 78n(e) (emphasis added). Insofar as Rule 14e–3(a) is designed to prevent the type of misappropriation at issue in this case, such acts are not legitimate objects of prevention because the Commission's misappropriation theory does not represent a coherent interpretation of the statutory "in connection with" requirement, as explained in Part I, *supra.* Even assuming that a person misappropriating information from the bidder commits fraud on the bidder, the Commission has provided no coherent or consistent explanation as to why such fraud is "in connection with" a tender offer, and thus the Commission may not seek to prevent indirectly conduct which it could not, under its current theory, prohibit directly.[11]

Finally, even further assuming that the Commission's misappropriation theory is a valid basis for direct liability, I fail to see how Rule 14e–3(a)'s elimination of the requirement of a breach of fiduciary duty is "reasonably designed" to prevent the underlying "fraudulent" acts. The majority's primary argument on this score is that in many cases " 'a breach of duty is likely but difficult to prove.' " *Ante,* at 674 (quoting Reply Brief for United States 16). Although the majority's hypothetical difficulties involved in a tipper-tippee situation might have some merit in the context of "classical" insider trading, there is no reason to suspect similar difficulties in "misappropriation" cases. In such cases, Rule 14e–3(a) requires the Commission to prove that the defendant "knows or has reason to know" that the nonpublic information upon which trading occurred came from the bidder or an agent of the bidder. Once the source of the information has been identified, it should be a simple task to obtain proof of any breach of duty. After all, it is the bidder itself that was defrauded in misappropriation cases, and there is no reason to suspect that the victim of the fraud would be reluctant to provide evidence against the perpetrator of the fraud.[12] There being no particular difficulties in proving a breach of duty in such circumstances, a rule removing the requirement of such a breach cannot be said to be "reasonably designed" to prevent underlying violations of the misappropriation theory.

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[11] I note that Rule 14e–3(a) also applies to persons trading upon information obtained from an insider of the target company. Insofar as the Rule seeks to prevent behavior that would be fraudulent under the "classical theory" of insider trading, this aspect of my analysis would not apply. As the majority notes, however, the Government "could not have prosecuted O'Hagan under the classical theory," *ante,* at 653, n. 5, hence this proviso has no application to the present case.

What Rule 14e–3(a) was in fact "designed" to do can be seen from the remainder of the majority's discussion of the Rule. Quoting at length from the Commission's explanation of the Rule in the Federal Register, the majority notes the Commission's concern with " 'unfair disparities in market information and market disruption.' " *Ante*, at 674 (quoting 45 Fed. Reg. 60412 (1980)). In the Commission's further explanation of Rule 14e–3(a)'s purpose—continuing the paragraph partially quoted by the majority—an example of the problem to be addressed is the so-called "stampede effect" based on leaks and rumors that may result from trading on material, nonpublic information. *Id.*, at 60413. The majority also notes (but does not rely on) the Government's contention that it would not be able to prohibit the supposedly problematic practice of "warehousing"—a bidder intentionally tipping allies to buy stock in advance of a bid announcement—if a breach of fiduciary duty were required. *Ante*, at 672–673, n. 17 (citing Reply Brief for United States 17). Given these policy concerns, the majority notes with seeming approval the Commission's justification of Rule 14e–3(a) "as a means necessary and proper to assure the efficacy of Williams Act protections." *Ante*, at 674.

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[12] Even where the information is obtained from an agent of the bidder, and the tippee claims not to have known that the tipper violated a duty, there is still no justification for Rule 14e–3(a). First, in such circumstances the tipper himself would have violated his fiduciary duty and would be liable under the misappropriation theory, assuming that theory were valid. Facing such liability, there is no reason to suspect that the tipper would gratuitously protect the tippee. And if the tipper accurately testifies that the tippee was (falsely) told that the information was passed on without violating the tipper's own duties, one can question whether the tippee has in fact done anything illegal, even under the Commission's misappropriation theory. Given that the fraudulent breach of fiduciary duty would have been complete at the moment of the tip, the subsequent trading on that information by the tippee might well fail even the Commission's own construction of the "in connection with" requirement. See *supra*, at 683–687. Thus, even if the tipper might, in some circumstances, be inclined to protect the tippee, see *ante*, at 675–676, n. 20, it is doubtful that the tippee would have violated the misappropriation theory in any event, and thus preventing such nonviolations cannot justify Rule 14e–3(a). Second, even were this scenario a legitimate concern, it would at most justify eliminating the requirement that the tippee "know" about the breach of duty. It would not explain Rule 14e–3(a)'s elimination of the requirement that there *be* such a breach.

Although this reasoning no doubt accurately reflects the Commission's purposes in adopting Rule 14e–3(a), it does little to support the validity of that Rule as a means designed to prevent such behavior: None of the above-described acts involve breaches of fiduciary duties, hence a Rule designed to prevent them does not satisfy § 14(e)'s requirement that the Commission's Rules promulgated under that section be "reasonably designed to prevent" acts and practices that "are fraudulent, deceptive, or manipulative." As the majority itself recognizes, there is no " 'general duty between all participants in market transactions to forgo actions based on material, nonpublic information,' " and such duty only " 'arises from a specific relationship between two parties.' " *Ante*, at 661 (quoting *Chiarella*, 445 U. S., at 233). Unfair disparities in market information, and the potential "stampede effect" of leaks, do not necessarily involve a breach of any duty to anyone, and thus are not proper objects for regulation in the name of "fraud" under § 14(e). Likewise (as the Government concedes, Reply Brief for United States 17), "warehousing" is not fraudulent given that the tippees are using the information with the express knowledge and approval of the source of the information. There simply would be no deception in violation of a duty to disclose under such circumstances. Cf. *ante*, at 654–655 (noting Government's concession that use of bidder's information with bidder's knowledge is not fraudulent under misappropriation theory).

While enhancing the overall efficacy of the Williams Act may be a reasonable goal, it is not one that may be pursued through § 14(e), which limits its grant of rulemaking authority to the prevention of fraud, deceit, and manipulation. As we have held in the context of § 10(b), "not every instance of financial unfairness constitutes fraudulent activity." *Chiarella, supra,* at 232. Because, in the context of misappropriation cases, Rule 14e–3(a) is not a means "reasonably designed" to prevent persons from engaging in fraud "in connection with" a tender offer, it exceeds the Commission's authority under § 14(e), and respondent's conviction for violation of that Rule cannot be sustained.

III

With regard to respondent's convictions on the mail fraud counts, my view is that they may be sustained regardless of whether respondent may be convicted of the securities fraud counts. Although the issue is highly fact bound, and not independently worthy of plenary consideration by this Court, we have nonetheless accepted the issue for review and therefore I will endeavor to resolve it.

As I read the indictment, it does not materially differ from the indictment in *Carpenter* v. *United States,* 484 U. S. 19 (1987). There, the Court was unanimous in upholding the mail fraud conviction, *id.,* at 28, despite being evenly divided on the securities fraud counts, *id.,* at 24. I do not think the wording of the indictment in the current case requires a finding of securities fraud in order to find mail fraud. Certainly the jury instructions do not make the mail fraud count dependent on the securities fraud counts. Rather, the counts were simply predicated on the same *factual* basis, and just because those facts are legally insufficient to constitute securities fraud does not make them legally insufficient to constitute mail fraud.[13] I therefore concur in the judgment of the Court as it relates to respondent's mail fraud convictions.

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[13] While the majority may find it strange that the "mail fraud net" is broader reaching than the securities fraud net, *ante*, at 678, n. 25, any such supposed strangeness—and the resulting allocation of prosecutorial responsibility between the Commission and the various United States Attorneys—is no business of this Court, and can be adequately addressed by Congress if it too perceives a problem regarding jurisdictional boundaries among the Nation's prosecutors. That the majority believes that, upon shifting from securities fraud to mail fraud prosecutions, the "practical consequences for individual defendants might not be large," *ibid.*, both undermines the supposed policy justifications for today's decision and makes more baffling the majority's willingness to go to such great lengths to save the Commission from itself.

WASHINGTON ET AL. *v.* GLUCKSBERG ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 96–110. Argued January 8, 1997—Decided June 26, 1997

It has always been a crime to assist a suicide in the State of Washington. The State's present law makes "[p]romoting a suicide attempt" a felony, and provides: "A person is guilty of [that crime] when he knowingly causes or aids another person to attempt suicide." Respondents, four Washington physicians who occasionally treat terminally ill, suffering patients, declare that they would assist these patients in ending their lives if not for the State's assisted-suicide ban. They, along with three gravely ill plaintiffs who have since died and a nonprofit organization that counsels people considering physician-assisted suicide, filed this suit against petitioners, the State and its Attorney General, seeking a declaration that the ban is, on its face, unconstitutional. They assert a liberty interest protected by the Fourteenth Amendment's Due Process Clause which extends to a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide. Relying primarily on *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, and *Cruzan* v. *Director, Mo. Dept. of Health*, 497 U. S. 261, the Federal District Court agreed, concluding that Washington's assisted-suicide ban is unconstitutional because it places an undue burden on the exercise of that constitutionally protected liberty interest. The en banc Ninth Circuit affirmed.

Held: Washington's prohibition against "caus[ing]" or "aid[ing]" a suicide does not violate the Due Process Clause. Pp. 710–736.

(a) An examination of our Nation's history, legal traditions, and practices demonstrates that Anglo-American common law has punished or otherwise disapproved of assisting suicide for over 700 years; that rendering such assistance is still a crime in almost every State; that such prohibitions have never contained exceptions for those who were near death; that the prohibitions have in recent years been reexamined and, for the most part, reaffirmed in a number of States; and that the President recently signed the Federal Assisted Suicide Funding Restriction Act of 1997, which prohibits the use of federal funds in support of physician-assisted suicide. Pp. 710–719.

(b) In light of that history, this Court's decisions lead to the conclusion that respondents' asserted "right" to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause.

The Court's established method of substantive-due-process analysis has two primary features: First, the Court has regularly observed that the Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition. *E. g., Moore* v. *East Cleveland,* 431 U. S. 494, 503 (plurality opinion). Second, the Court has required a "careful description" of the asserted fundamental liberty interest. *E. g., Reno* v. *Flores,* 507 U. S. 292, 302. The Ninth Circuit's and respondents' various descriptions of the interest here at stake—*e. g.,* a right to "determin[e] the time and manner of one's death," the "right to die," a "liberty to choose how to die," a right to "control of one's final days," "the right to choose a humane, dignified death," and "the liberty to shape death"—run counter to that second requirement. Since the Washington statute prohibits "aid[ing] another person to attempt suicide," the question before the Court is more properly characterized as whether the "liberty" specially protected by the Clause includes a right to commit suicide which itself includes a right to assistance in doing so. This asserted right has no place in our Nation's traditions, given the country's consistent, almost universal, and continuing rejection of the right, even for terminally ill, mentally competent adults. To hold for respondents, the Court would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State. Respondents' contention that the asserted interest *is* consistent with this Court's substantive-due-process cases, if not with this Nation's history and practice, is unpersuasive. The constitutionally protected right to refuse lifesaving hydration and nutrition that was discussed in *Cruzan, supra,* at 279, was not simply deduced from abstract concepts of personal autonomy, but was instead grounded in the Nation's history and traditions, given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment. And although *Casey* recognized that many of the rights and liberties protected by the Due Process Clause sound in personal autonomy, 505 U. S., at 852, it does not follow that any and all important, intimate, and personal decisions are so protected, see *San Antonio Independent School Dist.* v. *Rodriguez,* 411 U. S. 1, 33–34. *Casey* did not suggest otherwise. Pp. 719–728.

(c) The constitutional requirement that Washington's assisted-suicide ban be rationally related to legitimate government interests, see, *e. g., Heller* v. *Doe,* 509 U. S. 312, 319–320, is unquestionably met here. These interests include prohibiting intentional killing and preserving human life; preventing the serious public-health problem of suicide, especially among the young, the elderly, and those suffering from untreated pain or from depression or other mental disorders; protecting the medical profession's integrity and ethics and maintaining physicians' role as their patients' healers; protecting the poor, the elderly, disabled persons, the terminally ill, and persons in other vulnerable groups from indifference, prejudice, and psychological and financial pressure to end their lives; and avoiding a possible slide toward voluntary and perhaps even involuntary euthanasia. The relative strengths of these various interests need not be weighed exactingly, since they are unquestionably important and legitimate, and the law at issue is at least reasonably related to their promotion and protection. Pp. 728–735.

79 F. 3d 790, reversed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. O'CONNOR, J., filed a concurring opinion, in which GINSBURG and BREYER, JJ., joined in part, *post*, p. 736. STEVENS, J., *post*, p. 738, SOUTER, J., *post*, p. 752, GINSBURG, J., *post*, p. 789, and BREYER, J., *post*, p. 789, filed opinions concurring in the judgment.

William L. Williams, Senior Assistant Attorney General of Washington, argued the cause for petitioners. With him on the briefs were *Christine O. Gregoire,* Attorney General, and *William Berggren Collins,* Senior Assistant Attorney General.

Acting Solicitor General Dellinger argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General Hunger, Deputy Solicitor General Waxman, Deputy Assistant Attorney General Preston, Irving L. Gornstein,* and *Barbara C. Biddle.*

Kathryn L. Tucker argued the cause for respondents. With her on the brief were *David J. Burman, Kari Anne Smith,* and *Laurence H. Tribe.*[*]

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[*] Briefs of *amici curiae* urging reversal were filed for the State of California et al. by *Daniel E. Lungren,* Attorney General of California, *Robert L. Mukai,* Chief Assistant Attorney General, *Alvin J. Korobkin,* Senior Assistant Attorney General, *Thomas S. Lazar,* Deputy Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Jeff Sessions* of Alabama, *Gale A. Norton* of Colorado, *Robert A. Butterworth* of Florida, *Michael J. Bowers* of Georgia, *James E. Ryan* of Illinois, *Thomas J. Miller* of Iowa, *Richard P. Ieyoub* of Louisiana, *J. Joseph Cur-*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The question presented in this case is whether Washington's prohibition against "caus[ing]" or "aid[ing]" a suicide

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ran, Jr., of Maryland, *Frank J. Kelley* of Michigan, *Mike Moore* of Mississippi, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Jeffrey R. Howard* of New Hampshire, *Dennis C. Vacco* of New York, *Pedro R. Pierluisi* of Puerto Rico, *Charles Molony Condon* of South Carolina, *Mark W. Barnett* of South Dakota, *Charles W. Burson* of Tennessee, and *James S. Gilmore III* of Virginia; for the State of Oregon by *Theodore R. Kulongoski*, Attorney General, *Thomas A. Balmer*, Deputy Attorney General, *Virginia L. Linder*, Solicitor General, and *Stephen K. Bushong*, Assistant Attorney General; for Wayne County, Michigan, by *John D. O'Hair* and *Timothy A. Baughman;* for the District Attorney of Milwaukee County, Wisconsin, by *E. Michael McCann, pro se*, and *John M. Stoiber;* for Agudath Israel of America by *David Zwiebel* and *Morton M. Avigdor;* for the American Association of Homes and Services for the Aging et al. by *Joel G. Chefitz* and *Robert K. Niewijk;* for the American Center for Law and Justice by *Jay Alan Sekulow, James M. Henderson, Sr., Walter M. Weber, Keith A. Fournier, John G. Stepanovich*, and *Thomas P. Monaghan;* for the American Geriatrics Society by *John H. Pickering* and *Joseph E. Schmitz;* for the American Hospital Association by *Michael K. Kellogg* and *Margaret J. Hardy;* for the American Medical Association et al. by *Carter G. Phillips, Mark E. Haddad, Paul E. Kalb, Katherine L. Adams, Kirk B. Johnson*, and *Michael L. Ile;* for the American Suicide Foundation by *Ellen H. Moskowitz, Edward R. Grant*, and *John F. Cannon;* for the Catholic Health Association of the United States by *James A. Serritella, James C. Geoly, Kevin R. Gustafson, Thomas C. Shields, Peter M. Leibold*, and *Charles S. Gilham;* for the Catholic Medical Association by *Joseph J. Frank, Sergio Alvarez-Mena III*, and *Peter Buscemi;* for the Christian Legal Society et al. by *Edward J. Larson, Kimberlee Wood Colby*, and *Steven T. McFarland;* for the Evangelical Lutheran Church in America by *Edward McGlynn Gaffney, Jr., Susan D. Reece Martyn, Henry J. Bourguignon*, and *Phillip H. Harris;* for the Family Research Council by *Cathleen A. Cleaver, Mark A. Rothe*, and *Edward R. Grant;* for the Institute for Public Affairs of the Union of Orthodox Jewish Congregations of America et al. by *Richard B. Stone;* for the Legal Center for Defense of Life, Inc., et al. by *Dwight G. Duncan* and *Michael P. Tierney;* for the National Association of Prolife Nurses et al. by *Jacqulyn Kay Hall;* for the National Catholic Office for Persons with Disabilities et al. by *James Bopp, Jr., Thomas J. Marzen, Daniel Avila*, and *Jane E. T. Brockmann;* for the National Hospice Organization by *E. Barrett Pretty-*

offends the Fourteenth Amendment to the United States Constitution. We hold that it does not.

It has always been a crime to assist a suicide in the State of Washington. In 1854, Washington's first Territorial Leg-

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man, Jr.; for the National Legal Center for the Medically Dependent & Disabled, Inc., et al. by *James Bopp, Jr., Thomas J. Marzen, Daniel Avila,* and *Jane E. T. Brockmann;* for the National Right to Life Committee, Inc., by *James Bopp, Jr.,* and *Richard E. Coleson;* for the National Spinal Cord Injury Association, Inc., by *Leonard F. Zandrow, Jr.,* and *Calum B. Anderson;* for the Project on Death in America et al. by *Robert A. Burt;* for the Rutherford Institute by *Gregory D. Smith* and *John W. Whitehead;* for the Schiller Institute by *Max Dean;* for the United States Catholic Conference et al. by *Mark E. Chopko;* for Senator Orrin Hatch et al. by *Michael W. McConnell;* for Members of the New York and Washington State Legislatures by *Paul Benjamin Linton* and *Clarke D. Forsythe;* for Bioethics Professors by *George J. Annas;* for Gary Lee, M. D., et al. by *James Bopp, Jr., Bary A. Bostrom,* and *Richard E. Coleson;* and for Richard Thompson by *Mr. Thompson, pro se,* and *Richard H. Browne.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Cameron Clark, Karen E. Boxx,* and *Steven R. Shapiro;* for Americans for Death with Dignity et al. by *John R. Reese* and *Page R. Barnes;* for the American Medical Student Association et al. by *John H. Hall;* for the Center for Reproductive Law & Policy by *Janet Benshoof* and *Kathryn Kolbert;* for the Coalition of Hospice Professionals by *Gerald A. Rosenberg* and *Frances Kulka Browne;* for the Council for Secular Humanism et al. by *Ronald A. Lindsay;* for Gay Men's Health Crisis et al. by *Andrew I. Batavia;* for the National Women's Health Network et al. by *Sylvia A. Law;* for 36 Religious Organizations, Leaders, and Scholars by *Barbara McDowell* and *Gregory A. Castanias;* for the Washington State Psychological Association et al. by *Edward C. DuMont;* for Bioethicists by *Martin R. Gold* and *Robert P. Mulvey;* for Law Professors by *Charles H. Baron, David A. Hoffman,* and *Joshua M. Davis;* for State Legislators by *Sherry F. Colb;* and for Julian M. Whitaker, M. D., by *Jonathan W. Emord.*

Briefs of *amici curiae* were filed for the American College of Legal Medicine by *Miles J. Zaremski, Bruce C. Nelson,* and *Ila S. Rothschild;* for the International Anti-Euthanasia Task Force by *Wesley J. Smith;* for the Southern Center for Law and Ethics by *Tony G. Miller;* for Surviving Family Members in Support of Physician-Assisted Dying by *Katrin E. Frank, Robert A. Free,* and *Kathleen Wareham;* and for Ronald Dworkin et al. by *Mr. Dworkin, pro se, Peter L. Zimroth, Philip H. Curtis, Kent A. Yalowitz, Anand Agneshwar,* and *Abe Krash.*

islature outlawed "assisting another in the commission of self-murder."[1] Today, Washington law provides: "A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide." Wash. Rev. Code § 9A.36.060(1) (1994). "Promoting a suicide attempt" is a felony, punishable by up to five years' imprisonment and up to a $10,000 fine. §§ 9A.36.060(2) and 9A.20.021(1)(c). At the same time, Washington's Natural Death Act, enacted in 1979, states that the "withholding or withdrawal of life-sustaining treatment" at a patient's direction "shall not, for any purpose, constitute a suicide." Wash. Rev. Code § 70.122.070(1).[2]

Petitioners in this case are the State of Washington and its Attorney General. Respondents Harold Glucksberg, M. D., Abigail Halperin, M. D., Thomas A. Preston, M. D., and Peter Shalit, M. D., are physicians who practice in Washington. These doctors occasionally treat terminally ill, suffering patients, and declare that they would assist these patients in ending their lives if not for Washington's assisted-suicide ban.[3] In January 1994, respondents, along with three gravely ill, pseudonymous plaintiffs who have since died and

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[1] Act of Apr. 28, 1854, § 17, 1854 Wash. Laws 78 ("Every person deliberately assisting another in the commission of self-murder, shall be deemed guilty of manslaughter"); see also Act of Dec. 2, 1869, § 17, 1869 Wash. Laws 201; Act of Nov. 10, 1873, § 19, 1873 Wash. Laws 184; Criminal Code, ch. 249, §§ 135–136, 1909 Wash. Laws, 11th Sess., 929.

[2] Under Washington's Natural Death Act, "adult persons have the fundamental right to control the decisions relating to the rendering of their own health care, including the decision to have life-sustaining treatment withheld or withdrawn in instances of a terminal condition or permanent unconscious condition." Wash. Rev. Code § 70.122.010 (1994). In Washington, "[a]ny adult person may execute a directive directing the withholding or withdrawal of life-sustaining treatment in a terminal condition or permanent unconscious condition," § 70.122.030, and a physician who, in accordance with such a directive, participates in the withholding or withdrawal of life-sustaining treatment is immune from civil, criminal, or professional liability, § 70.122.051.

[3] Glucksberg Declaration, App. 35; Halperin Declaration, *id.*, at 49–50; Preston Declaration, *id.*, at 55–56; Shalit Declaration, *id.*, at 73–74.

Compassion in Dying, a nonprofit organization that counsels people considering physician-assisted suicide, sued in the United States District Court, seeking a declaration that Wash. Rev. Code § 9A.36.060(1) (1994) is, on its face, unconstitutional. *Compassion in Dying* v. *Washington,* 850 F. Supp. 1454, 1459 (WD Wash. 1994).[4]

The plaintiffs asserted "the existence of a liberty interest protected by the Fourteenth Amendment which extends to a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide." *Ibid.* Relying primarily on *Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U. S. 833 (1992), and *Cruzan* v. *Director, Mo. Dept. of Health,* 497 U. S. 261 (1990), the District Court agreed, 850 F. Supp., at 1459–1462, and concluded that Washington's assisted-suicide ban is unconstitutional because it "places an undue burden on the exercise of [that] constitutionally protected liberty interest." *Id.,* at 1465.[5] The District Court also decided that the Washington statute violated the Equal Protection Clause's requirement that " 'all persons similarly situated . . . be treated alike.' " *Id.,* at 1466 (quoting *Cleburne* v. *Cleburne Living Center, Inc.,* 473 U. S. 432, 439 (1985)).

A panel of the Court of Appeals for the Ninth Circuit reversed, emphasizing that "[i]n the two hundred and five years of our existence no constitutional right to aid in killing oneself has ever been asserted and upheld by a court of final jurisdiction." *Compassion in Dying* v. *Washington,* 49 F. 3d 586, 591 (1995). The Ninth Circuit reheard the case en banc, reversed the panel's decision, and affirmed the District Court. *Compassion in Dying* v. *Washington,* 79 F. 3d 790, 798 (1996). Like the District Court, the en banc Court of Appeals emphasized our *Casey* and *Cruzan* decisions. 79 F. 3d, at 813–816. The court also discussed what it described as "historical" and "current societal attitudes" toward suicide and assisted suicide, *id.*, at 806–812, and concluded that "the Constitution encompasses a due process liberty interest in controlling the time and manner of one's death—that there is, in short, a constitutionally-recognized 'right to die.'" *Id.*, at 816. After "[w]eighing and then balancing" this interest against Washington's various interests, the court held that the State's assisted-suicide ban was unconstitutional "as applied to terminally ill competent adults who wish to hasten their deaths with medication prescribed by their physicians." *Id.*, at 836, 837.[6] The court did not reach the District Court's equal protection holding. *Id.*, at 838.[7] We granted certiorari, 518 U. S. 1057 (1996), and now reverse.

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[4] John Doe, Jane Roe, and James Poe, plaintiffs in the District Court, were then in the terminal phases of serious and painful illnesses. They declared that they were mentally competent and desired assistance in ending their lives. Declaration of Jane Roe, *id.,* at 23–25; Declaration of John Doe, *id.,* at 27–28; Declaration of James Poe, *id.,* at 30–31; *Compassion in Dying,* 850 F. Supp., at 1456–1457.

[5] The District Court determined that *Casey's* "undue burden" standard, 505 U. S., at 874 (joint opinion), not the standard from *United States* v. *Salerno,* 481 U. S. 739, 745 (1987) (requiring a showing that "no set of circumstances exists under which the [law] would be valid"), governed the plaintiffs' facial challenge to the assisted-suicide ban. 850 F. Supp., at 1462–1464.

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[6] Although, as JUSTICE STEVENS observes, *post,* at 739 (opinion concurring in judgments), "[the court's] analysis and eventual holding that the statute was unconstitutional was not limited to a particular set of plaintiffs before it," the court did note that "[d]eclaring a statute unconstitutional as applied to members of a group is atypical but not uncommon." 79 F. 3d, at 798, n. 9, and emphasized that it was "not deciding the facial validity of [the Washington statute]," *id.*, at 797–798, and nn. 8–9. It is therefore the court's holding that Washington's physician-assisted suicide statute is unconstitutional as applied to the "class of terminally ill, mentally competent patients," *post,* at 750 (STEVENS, J., concurring in judgments), that is before us today.

[7] The Court of Appeals did note, however, that "the equal protection argument relied on by [the District Court] is not insubstantial," 79 F. 3d, at 838, n. 139, and sharply criticized the opinion in a separate case then pending before the Ninth Circuit, *Lee* v. *Oregon,* 891 F. Supp. 1429 (Ore. 1995) (Oregon's Death With Dignity Act, which permits physician-assisted

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We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices. See, *e. g., Casey, supra,* at 849–850; *Cruzan, supra,* at 269–279; *Moore* v. *East Cleveland,* 431 U. S. 494, 503 (1977) (plurality opinion) (noting importance of "careful 'respect for the teachings of history' "). In almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide.[8] The States' assisted-suicide bans are not innovations. Rather, they are longstanding expressions of the States' commitment to the protection and preservation of all human life. *Cruzan, supra,* at 280 ("[T]he States—indeed, all civilized nations—demonstrate their commitment to life by treating homicide as a serious crime. Moreover, the major-

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suicide, violates the Equal Protection Clause because it does not provide adequate safeguards against abuse), vacated, *Lee* v. *Oregon,* 107 F. 3d 1382 (CA9 1997) (concluding that plaintiffs lacked Article III standing). *Lee,* of course, is not before us, any more than it was before the Court of Appeals below, and we offer no opinion as to the validity of the *Lee* courts' reasoning. In *Vacco* v. *Quill, post,* p. 793, however, decided today, we hold that New York's assisted-suicide ban does not violate the Equal Protection Clause.

[8] See *Compassion in Dying* v. *Washington,* 79 F. 3d 790, 847, and nn. 10–13 (CA9 1996) (Beezer, J., dissenting) ("In total, forty-four states, the District of Columbia and two territories prohibit or condemn assisted suicide") (citing statutes and cases); *Rodriguez* v. *British Columbia (Attorney General),* 107 D. L. R. (4th) 342, 404 (Can. 1993) ("[A] blanket prohibition on assisted suicide . . . is the norm among western democracies") (discussing assisted-suicide provisions in Austria, Spain, Italy, the United Kingdom, the Netherlands, Denmark, Switzerland, and France). Since the Ninth Circuit's decision, Louisiana, Rhode Island, and Iowa have enacted statutory assisted-suicide bans. La. Rev. Stat. Ann. § 14:32.12 (West Supp. 1997); R. I. Gen. Laws §§ 11–60–1, 11–60–3 (Supp. 1996); Iowa Code Ann. §§ 707A.2, 707A.3 (Supp. 1997). For a detailed history of the States' statutes, see Marzen, O'Dowd, Crone, & Balch, Suicide: A Constitutional Right?, 24 Duquesne L. Rev. 1, 148–242 (1985) (App.) (hereinafter Marzen).

ity of States in this country have laws imposing criminal penalties on one who assists another to commit suicide"); see *Stanford* v. *Kentucky,* 492 U. S. 361, 373 (1989) ("[T]he primary and most reliable indication of [a national] consensus is . . . the pattern of enacted laws"). Indeed, opposition to and condemnation of suicide—and, therefore, of assisting suicide—are consistent and enduring themes of our philosophical, legal, and cultural heritages. See generally Marzen 17–56; New York State Task Force on Life and the Law, When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context 77–82 (May 1994) (hereinafter New York Task Force).

More specifically, for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide.[9] *Cruzan,* 497 U. S., at 294–295 (SCALIA, J., concurring). In the 13th century, Henry de Bracton, one of the first legal-treatise writers, observed that "[j]ust as a man may commit felony by slaying another so may he do so by slaying himself." 2 Bracton on Laws and Customs of England 423 (f. 150) (G. Woodbine ed., S. Thorne transl., 1968). The real and personal property of one who killed himself to avoid conviction and punishment for a crime were forfeit to the King; however, thought Bracton, "if a man slays himself in weariness of life or because he is unwilling to endure further bodily pain . . . [only] his movable goods [were] confiscated." *Id.,* at 423–424 (f. 150). Thus, "[t]he principle that suicide of a sane person, for whatever reason, was a punishable felony was . . . introduced into

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[9] The common law is thought to have emerged through the expansion of pre-Norman institutions sometime in the 12th century. J. Baker, An Introduction to English Legal History 11 (2d ed. 1979). England adopted the ecclesiastical prohibition on suicide five centuries earlier, in the year 673 at the Council of Hereford, and this prohibition was reaffirmed by King Edgar in 967. See G. Williams, The Sanctity of Life and the Criminal Law 257 (1957).

English common law."[10] Centuries later, Sir William Blackstone, whose Commentaries on the Laws of England not only provided a definitive summary of the common law but was also a primary legal authority for 18th- and 19th-century American lawyers, referred to suicide as "self-murder" and "the pretended heroism, but real cowardice, of the Stoic philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to endure . . . ." 4 W. Blackstone, Commentaries *189. Blackstone emphasized that "the law has . . . ranked [suicide] among the highest crimes," *ibid.*, although, anticipating later developments, he conceded that the harsh and shameful punishments imposed for suicide "borde[r] a little upon severity." *Id.*, at *190.

For the most part, the early American Colonies adopted the common-law approach. For example, the legislators of the Providence Plantations, which would later become Rhode Island, declared, in 1647, that "[s]elf-murder is by all agreed to be the most unnatural, and it is by this present Assembly declared, to be that, wherein he that doth it, kills himself out of a premeditated hatred against his own life or other humor: . . . his goods and chattels are the king's custom, but not his debts nor lands; but in case he be an infant, a lunatic, mad or distracted man, he forfeits nothing." The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations 1647–1719, p. 19 (J. Cushing ed. 1977). Virginia also required ignominious burial for suicides, and their estates were forfeit to the Crown. A. Scott, Criminal Law in Colonial Virginia 108, and n. 93, 198, and n. 15 (1930).

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[10] Marzen 59. Other late-medieval treatise writers followed and restated Bracton; one observed that "man-slaughter" may be "[o]f [one]self; as in case, when people hang themselves or hurt themselves, or otherwise kill themselves of their own felony" or "[o]f others; as by beating, famine, or other punishment; in like cases, all are man-slayers." A. Horne, The Mirrour of Justices, ch. 1, § 9, pp. 41–42 (W. Robinson ed. 1903). By the mid-16th century, the Court at Common Bench could observe that "[suicide] is an Offence against Nature, against God, and against the King. . . . [T]o destroy one's self is contrary to Nature, and a Thing most horrible." *Hales* v. *Petit,* 1 Plowd. Com. 253, 261, 75 Eng. Rep. 387, 400 (1561–1562).

In 1644, Sir Edward Coke published his Third Institute, a lodestar for later common lawyers. See T. Plucknett, A Concise History of the Common Law 281–284 (5th ed. 1956). Coke regarded suicide as a category of murder, and agreed with Bracton that the goods and chattels—but not, for Coke, the lands—of a sane suicide were forfeit. 3 E. Coke, Institutes *54. William Hawkins, in his 1716 Treatise of the Pleas of the Crown, followed Coke, observing that "our laws have always had . . . an abhorrence of this crime." 1 W. Hawkins, Pleas of the Crown, ch. 27, § 4, p. 164 (T. Leach ed. 1795).

Over time, however, the American Colonies abolished these harsh common-law penalties. William Penn abandoned the criminal-forfeiture sanction in Pennsylvania in 1701, and the other Colonies (and later, the other States) eventually followed this example. *Cruzan, supra,* at 294 (SCALIA, J., concurring). Zephaniah Swift, who would later become Chief Justice of Connecticut, wrote in 1796:

> "There can be no act more contemptible, than to attempt to punish an offender for a crime, by exercising a mean act of revenge upon lifeless clay, that is insensible of the punishment. There can be no greater cruelty, than the inflicting [of] a punishment, as the forfeiture of goods, which must fall solely on the innocent offspring of the offender. . . . [Suicide] is so abhorrent to the feelings of mankind, and that strong love of life which is implanted in the human heart, that it cannot be so frequently committed, as to become dangerous to society. There can of course be no necessity of any punishment." 2 Z. Swift, A System of the Laws of the State of Connecticut 304 (1796).

This statement makes it clear, however, that the movement away from the common law's harsh sanctions did not represent an acceptance of suicide; rather, as Chief Justice Swift observed, this change reflected the growing consensus that it was unfair to punish the suicide's family for his wrongdoing. *Cruzan, supra,* at 294 (SCALIA, J., concurring). Nonetheless, although States moved away from Blackstone's treatment of suicide, courts continued to condemn it as a grave public wrong. See, *e. g., Bigelow* v. *Berkshire Life Ins. Co.*, 93 U. S. 284, 286 (1876) (suicide is "an act of criminal self-destruction"); *Von Holden* v. *Chapman*, 87 App. Div. 2d 66, 70–71, 450 N. Y. S. 2d 623, 626–627 (1982); *Blackwood* v. *Jones*, 111 Fla. 528, 532, 149 So. 600, 601 (1933) ("No sophistry is tolerated . . . which seek[s] to justify self-destruction as commendable or even a matter of personal right").

That suicide remained a grievous, though nonfelonious, wrong is confirmed by the fact that colonial and early state legislatures and courts did not retreat from prohibiting assisting suicide. Swift, in his early 19th-century treatise on the laws of Connecticut, stated that "[i]f one counsels another to commit suicide, and the other by reason of the advice kills himself, the advisor is guilty of murder as principal." 2 Z. Swift, A Digest of the Laws of the State of Connecticut 270 (1823). This was the well-established common-law view, see *In re Joseph G.*, 34 Cal. 3d 429, 434–435, 667 P. 2d 1176, 1179 (1983); *Commonwealth* v. *Mink*, 123 Mass. 422, 428 (1877) ("'Now if the murder of one's self is felony, the accessory is equally guilty as if he had aided and abetted in the murder'") (quoting Chief Justice Parker's charge to the jury in *Commonwealth* v. *Bowen*, 13 Mass. 356 (1816)), as was the similar principle that the consent of a homicide victim is "wholly immaterial to the guilt of the person who cause[d] [his death]," 3 J. Stephen, A History of the Criminal Law of England 16 (1883); see 1 F. Wharton, Criminal Law §§451–452 (9th ed. 1885); *Martin* v. *Commonwealth*, 184 Va. 1009, 1018–1019, 37 S. E. 2d 43, 47 (1946) ("'The right to life and to personal security is not only sacred in the estimation of the common law, but it is inalienable'"). And the prohibitions against assisting suicide never contained exceptions for those who were near death. Rather, "[t]he life of those to whom life ha[d] become a burden—of those who [were] hopelessly diseased or fatally wounded—nay, even the lives of criminals condemned to death, [were] under the protection of the law, equally as the lives of those who [were] in the full tide of life's enjoyment, and anxious to continue to live." *Blackburn* v. *State*, 23 Ohio St. 146, 163 (1872); see *Bowen, supra*, at 360 (prisoner who persuaded another to commit suicide could be tried for murder, even though victim was scheduled shortly to be executed).

The earliest American statute explicitly to outlaw assisting suicide was enacted in New York in 1828, Act of Dec. 10, 1828, ch. 20, § 4, 1828 N. Y. Laws 19 (codified at 2 N. Y. Rev. Stat. pt. 4, ch. 1, Tit. 2, Art. 1, § 7, p. 661 (1829)), and many of the new States and Territories followed New York's example. Marzen 73–74. Between 1857 and 1865, a New York commission led by Dudley Field drafted a criminal code that prohibited "aiding" a suicide and, specifically, "furnish[ing] another person with any deadly weapon or poisonous drug, knowing that such person intends to use such weapon or drug in taking his own life." *Id.*, at 76–77. By the time the Fourteenth Amendment was ratified, it was a crime in most States to assist a suicide. See *Cruzan*, 497 U. S., at 294–295 (SCALIA, J., concurring). The Field Penal Code was adopted in the Dakota Territory in 1877 and in New York in 1881, and its language served as a model for several other western States' statutes in the late 19th and early 20th centuries. Marzen 76–77, 205–206, 212–213. California, for example, codified its assisted-suicide prohibition in 1874, using language similar to the Field Code's.[11] In this century, the Model Penal Code also prohibited "aiding" suicide, prompting many States to enact or revise their assisted-suicide bans.[12] The code's drafters observed that "the interests in the sanctity of life that are represented by the criminal homicide laws are threatened by one who expresses a willingness to participate in taking the life of another, even though the act may be accomplished with the consent, or at the request, of the suicide victim." American Law Institute, Model Penal Code § 210.5, Comment 5, p. 100 (Official Draft and Revised Comments 1980).

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[11] In 1850, the California Legislature adopted the English common law, under which assisting suicide was, of course, a crime. Act of Apr. 13, 1850, ch. 95, 1850 Cal. Stats. 219. The provision adopted in 1874 provided that "[e]very person who deliberately aids or advises, or encourages another to commit suicide, is guilty of a felony." Act of Mar. 30, 1874, ch. 614, § 13,400 (codified at Cal. Penal Code § 400 (T. Hittel ed. 1876)).

Though deeply rooted, the States' assisted-suicide bans have in recent years been reexamined and, generally, reaffirmed. Because of advances in medicine and technology, Americans today are increasingly likely to die in institutions, from chronic illnesses. President's Comm'n for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Deciding to Forego Life-Sustaining Treatment 16–18 (1983). Public concern and democratic action are therefore sharply focused on how best to protect dignity and independence at the end of life, with the result that there have been many significant changes in state laws and in the attitudes these laws reflect. Many States, for example, now permit "living wills," surrogate health-care decisionmaking, and the withdrawal or refusal of life-sustaining medical treatment. See *Vacco* v. *Quill, post,* at 804–806; 79 F. 3d, at 818–820; *People* v. *Kevorkian,* 447 Mich. 436, 478–480, and nn. 53–56, 527 N. W. 2d 714, 731–732, and nn. 53–56 (1994). At the same time, however, voters and legislators continue for the most part to reaffirm their States' prohibitions on assisting suicide.

The Washington statute at issue in this case, Wash. Rev. Code § 9A.36.060 (1994), was enacted in 1975 as part of a revision of that State's criminal code. Four years later,

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[12] "A person who purposely aids or solicits another to commit suicide is guilty of a felony in the second degree if his conduct causes such suicide or an attempted suicide, and otherwise of a misdemeanor." American Law Institute, Model Penal Code § 210.5(2) (Official Draft and Revised Comments 1980).

Washington passed its Natural Death Act, which specifically stated that the "withholding or withdrawal of life-sustaining treatment . . . shall not, for any purpose, constitute a suicide" and that "[n]othing in this chapter shall be construed to condone, authorize, or approve mercy killing . . . ." Natural Death Act, 1979 Wash. Laws, ch. 112, § 8(1), p. 11 (codified at Wash. Rev. Code §§ 70.122.070(1), 70.122.100 (1994)). In 1991, Washington voters rejected a ballot initiative which, had it passed, would have permitted a form of physician-assisted suicide.[13] Washington then added a provision to the Natural Death Act expressly excluding physician-assisted suicide. 1992 Wash. Laws, ch. 98, § 10; Wash. Rev. Code § 70.122.100 (1994).

California voters rejected an assisted-suicide initiative similar to Washington's in 1993. On the other hand, in 1994, voters in Oregon enacted, also through ballot initiative, that State's "Death With Dignity Act," which legalized physician-assisted suicide for competent, terminally ill adults.[14] Since the Oregon vote, many proposals to legalize assisted-suicide have been and continue to be introduced in the States' legislatures, but none has been enacted.[15] And just last year, Iowa and Rhode Island joined the overwhelming majority of States explicitly prohibiting assisted suicide. See Iowa Code Ann. §§ 707A.2, 707A.3 (Supp. 1997); R. I. Gen. Laws §§ 11–60–1, 11–60–3 (Supp. 1996). Also, on April 30, 1997, President Clinton signed the Federal Assisted Suicide Funding Restriction Act of 1997, which prohibits the use of federal funds in support of physician-assisted suicide. Pub. L. 105–12, 111 Stat. 23 (codified at 42 U. S. C. § 14401 *et seq.*).[16]

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[13] Initiative 119 would have amended Washington's Natural Death Act, Wash. Rev. Code § 70.122.010 *et seq.* (1994), to permit "aid-in-dying," defined as "aid in the form of a medical service provided in person by a physician that will end the life of a conscious and mentally competent qualified patient in a dignified, painless and humane manner, when requested voluntarily by the patient through a written directive in accordance with this chapter at the time the medical service is to be provided." App. H to Pet. for Cert. 3–4.

[14] Ore. Rev. Stat. § 127.800 *et seq.* (1996); *Lee* v. *Oregon*, 891 F. Supp. 1429 (Ore. 1995) (Oregon Act does not provide sufficient safeguards for terminally ill persons and therefore violates the Equal Protection Clause), vacated, *Lee* v. *Oregon*, 107 F. 3d 1382 (CA9 1997).

[15] See, *e. g.*, Alaska H. B. 371 (1996); Ariz. S. B. 1007 (1996); Cal. A. B. 1080, A. B. 1310 (1995); Colo. H. B. 1185 (1996); Colo. H. B. 1308 (1995); Conn. H. B. 6298 (1995); Ill. H. B. 691, S. B. 948 (1997); Me. H. P. 663 (1997); Me. H. P. 552 (1995); Md. H. B. 474 (1996); Md. H. B. 933 (1995); Mass. H. B. 3173 (1995); Mich. H. B. 6205, S. B. 556 (1996); Mich. H. B. 4134

(1995); Miss. H. B. 1023 (1996); N. H. H. B. 339 (1995); N. M. S. B. 446 (1995); N. Y. S. B. 5024, A. B. 6333 (1995); Neb. L. B. 406 (1997); Neb. L. B. 1259 (1996); R. I. S. 2985 (1996); Vt. H. B. 109 (1997); Vt. H. B. 335 (1995); Wash. S. B. 5596 (1995); Wis. A. B. 174, S. B. 90 (1995); Senate of Canada, Of Life and Death, Report of the Special Senate Committee on Euthanasia and Assisted Suicide A–156 (June 1995) (describing unsuccessful proposals, between 1991–1994, to legalize assisted suicide).

[16] Other countries are embroiled in similar debates: The Supreme Court of Canada recently rejected a claim that the Canadian Charter of Rights and Freedoms establishes a fundamental right to assisted suicide, *Rodriguez* v. *British Columbia (Attorney General)*, 107 D. L. R. (4th) 342 (1993); the British House of Lords Select Committee on Medical Ethics refused to recommend any change in Great Britain's assisted-suicide prohibition, House of Lords, Session 1993–94 Report of the Select Committee on Medical Ethics, 12 Issues in Law & Med. 193, 202 (1996) ("We identify no circumstances in which assisted suicide should be permitted"); New Zealand's Parliament rejected a proposed "Death With Dignity Bill" that would have legalized physician-assisted suicide in August 1995, Graeme, MPs Throw out Euthanasia Bill, The Dominion (Wellington), Aug. 17, 1995, p. 1; and the Northern Territory of Australia legalized assisted suicide and voluntary euthanasia in 1995, see Shenon, Australian Doctors Get Right to Assist Suicide, N. Y. Times, July 28, 1995, p. A8. As of February 1997, three persons had ended their lives with physician assistance in the Northern Territory. Mydans, Assisted Suicide: Australia Faces a Grim Reality, N. Y. Times, Feb. 2, 1997, p. A3. On March 24, 1997, however, the Australian Senate voted to overturn the Northern Territory's law. Thornhill, Australia Repeals Euthanasia Law, Washington Post, Mar. 25, 1997, p. A14; see Euthanasia Laws Act 1997, No. 17, 1997 (Austl.). On the other hand, on May 20, 1997, Colombia's Constitutional Court legalized voluntary euthanasia for terminally ill people. C–239/97 de Mayo 20, 1997, Corte

Thus, the States are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues. For example, New York State's Task Force on Life and the Law—an ongoing, blue-ribbon commission composed of doctors, ethicists, lawyers, religious leaders, and interested laymen—was convened in 1984 and commissioned with "a broad mandate to recommend public policy on issues raised by medical advances." New York Task Force vii. Over the past decade, the Task Force has recommended laws relating to end-of-life decisions, surrogate pregnancy, and organ donation. *Id.*, at 118–119. After studying physician-assisted suicide, however, the Task Force unanimously concluded that "[l]egalizing assisted suicide and euthanasia would pose profound risks to many individuals who are ill and vulnerable. . . . [T]he potential dangers of this dramatic change in public policy would outweigh any benefit that might be achieved." *Id.*, at 120.

Attitudes toward suicide itself have changed since Bracton, but our laws have consistently condemned, and continue to prohibit, assisting suicide. Despite changes in medical technology and notwithstanding an increased emphasis on the importance of end-of-life decisionmaking, we have not retreated from this prohibition. Against this backdrop of history, tradition, and practice, we now turn to respondents' constitutional claim.

II

The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. *Collins* v. *Harker Heights*, 503 U. S. 115, 125 (1992) (Due Process Clause "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them' ") (quot-

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Constitucional, M. P. Carlos Gaviria Diaz; see Colombia's Top Court Legalizes Euthanasia, Orlando Sentinel, May 22, 1997, p. A18.

ing *Daniels* v. *Williams,* 474 U. S. 327, 331 (1986)). The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests. *Reno* v. *Flores,* 507 U. S. 292, 301–302 (1993); *Casey,* 505 U. S., at 851. In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, *Loving* v. *Virginia,* 388 U. S. 1 (1967); to have children, *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U. S. 535 (1942); to direct the education and upbringing of one's children, *Meyer* v. *Nebraska,* 262 U. S. 390 (1923); *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925); to marital privacy, *Griswold* v. *Connecticut,* 381 U. S. 479 (1965); to use contraception, *ibid.; Eisenstadt* v. *Baird,* 405 U. S. 438 (1972); to bodily integrity, *Rochin* v. *California,* 342 U. S. 165 (1952), and to abortion, *Casey, supra.* We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan,* 497 U. S., at 278–279.

But we "ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins,* 503 U. S., at 125. By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," *ibid.*, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court, *Moore,* 431 U. S., at 502 (plurality opinion).

Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," *id.*, at 503 (plurality opinion); *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko* v. *Connecticut*, 302 U. S. 319, 325, 326 (1937). Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. *Flores*, *supra*, at 302; *Collins*, *supra*, at 125; *Cruzan*, *supra*, at 277–278. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking," *Collins*, *supra*, at 125, that direct and restrain our exposition of the Due Process Clause. As we stated recently in *Flores*, the Fourteenth Amendment "forbids the government to infringe . . . 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." 507 U. S., at 302.

JUSTICE SOUTER, relying on Justice Harlan's dissenting opinion in *Poe* v. *Ullman*, 367 U. S. 497 (1961), would largely abandon this restrained methodology, and instead ask "whether [Washington's] statute sets up one of those 'arbitrary impositions' or 'purposeless restraints' at odds with the Due Process Clause of the Fourteenth Amendment," *post*, at 752 (quoting *Poe*, *supra*, at 543 (Harlan, J., dissenting)).[17]

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[17] In JUSTICE SOUTER's opinion, Justice Harlan's *Poe* dissent supplies the "modern justification" for substantive-due-process review. *Post*, at 756, and n. 4 (opinion concurring in judgment). But although Justice Harlan's opinion has often been cited in due process cases, we have never abandoned our fundamental-rights-based analytical method. Just four Terms ago, six of the Justices now sitting joined the Court's opinion in *Reno* v. *Flores*, 507 U. S. 292, 301–305 (1993); *Poe* was not even cited. And in *Cruzan* v. *Director, Mo. Dept. of Health*, 497 U. S. 261 (1990), neither the Court's nor the concurring opinions relied on *Poe;* rather, we concluded that the right to refuse unwanted medical treatment was so rooted in our history, tradition, and practice as to require special protection under the

In our view, however, the development of this Court's substantive-due-process jurisprudence, described briefly *supra,* at 719–720, has been a process whereby the outlines of the "liberty" specially protected by the Fourteenth Amendment—never fully clarified, to be sure, and perhaps not capable of being fully clarified—have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition. This approach tends to rein in the subjective elements that are necessarily present in due process judicial review. In addition, by establishing a threshold requirement—that a challenged state action implicate a fundamental right—before requiring more than a reasonable relation to a legitimate state interest to justify the action, it avoids the need for complex balancing of competing interests in every case.

Turning to the claim at issue here, the Court of Appeals stated that "[p]roperly analyzed, the first issue to be resolved is whether there is a liberty interest in determining the time and manner of one's death," 79 F. 3d, at 801, or, in other words, "[i]s there a right to die?," *id.*, at 799. Similarly, respondents assert a "liberty to choose how to die" and a right to "control of one's final days," Brief for Respondents 7, and describe the asserted liberty as "the right to choose a humane, dignified death," *id.*, at 15, and "the liberty to shape death," *id.*, at 18. As noted above, we have a tradition of carefully formulating the interest at stake in substantive-due-process cases. For example, although *Cruzan* is often described as a "right to die" case, see 79 F. 3d, at 799; *post,* at 745 (STEVENS, J., concurring in judgments) (*Cruzan* recognized "the more specific interest in making decisions about

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Fourteenth Amendment. *Cruzan,* 497 U. S., at 278–279; *id.*, at 287–288 (O'CONNOR, J., concurring). True, the Court relied on Justice Harlan's dissent in *Casey,* 505 U. S., at 848–850, but, as *Flores* demonstrates, we did not in so doing jettison our established approach. Indeed, to read such a radical move into the Court's opinion in *Casey* would seem to fly in the face of that opinion's emphasis on *stare decisis.* 505 U. S., at 854–869.

how to confront an imminent death"), we were, in fact, more precise: We assumed that the Constitution granted competent persons a "constitutionally protected right to refuse lifesaving hydration and nutrition." *Cruzan*, 497 U. S., at 279; *id.*, at 287 (O'CONNOR, J., concurring) ("[A] liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions"). The Washington statute at issue in this case prohibits "aid[ing] another person to attempt suicide," Wash. Rev. Code § 9A.36.060(1) (1994), and, thus, the question before us is whether the "liberty" specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so.[18]

We now inquire whether this asserted right has any place in our Nation's traditions. Here, as discussed *supra*, at 710–719, we are confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults. To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State. See *Jackman* v. *Rosenbaum Co.*, 260 U. S. 22, 31 (1922) ("If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it"); *Flores*, 507 U. S., at 303 ("The mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it").

Respondents contend, however, that the liberty interest they assert *is* consistent with this Court's substantive-due-process line of cases, if not with this Nation's history and practice. Pointing to *Casey* and *Cruzan*, respondents read our jurisprudence in this area as reflecting a general tradition of "self-sovereignty," Brief for Respondents 12, and as teaching that the "liberty" protected by the Due Process Clause includes "basic and intimate exercises of personal autonomy," *id.*, at 10; see *Casey*, 505 U. S., at 847 ("It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter"). According to respondents, our liberty jurisprudence, and the broad, individualistic principles it reflects, protects the "liberty of competent, terminally ill adults to make end-of-life decisions free of undue government interference." Brief for Respondents 10. The question presented in this case, however, is whether the protections of the Due Process Clause include a right to commit suicide with another's assistance. With this "careful description" of respondents' claim in mind, we turn to *Casey* and *Cruzan*.

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[18] See, *e. g.*, *Quill* v. *Vacco*, 80 F. 3d 716, 724 (CA2 1996) ("right to assisted suicide finds no cognizable basis in the Constitution's language or design"); *Compassion in Dying* v. *Washington*, 49 F. 3d 586, 591 (CA9 1995) (referring to alleged "right to suicide," "right to assistance in suicide," and "right to aid in killing oneself"); *People* v. *Kevorkian*, 447 Mich. 436, 476, n. 47, 527 N. W. 2d 714, 730, n. 47 (1994) ("[T]he question that we must decide is whether the [C]onstitution encompasses a right to commit suicide and, if so, whether it includes a right to assistance").

In *Cruzan*, we considered whether Nancy Beth Cruzan, who had been severely injured in an automobile accident and was in a persistive vegetative state, "ha[d] a right under the United States Constitution which would require the hospital to withdraw life-sustaining treatment" at her parents' request. 497 U. S., at 269. We began with the observation that "[a]t common law, even the touching of one person by another without consent and without legal justification was a battery." *Ibid.* We then discussed the related rule that "informed consent is generally required for medical treatment." *Ibid.* After reviewing a long line of relevant state cases, we concluded that "the common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment." *Id.*, at 277. Next, we reviewed our own cases on the subject, and stated that "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." *Id.*, at 278. Therefore, "for purposes of [that] case, we assume[d] that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition." *Id.*, at 279; see *id.*, at 287 (O'CONNOR, J., concurring). We concluded that, notwithstanding this right, the Constitution permitted Missouri to require clear and convincing evidence of an incompetent patient's wishes concerning the withdrawal of life-sustaining treatment. *Id.*, at 280–281.

Respondents contend that in *Cruzan* we "acknowledged that competent, dying persons have the right to direct the removal of life-sustaining medical treatment and thus hasten death," Brief for Respondents 23, and that "the constitutional principle behind recognizing the patient's liberty to direct the withdrawal of artificial life support applies at least as strongly to the choice to hasten impending death by consuming lethal medication," *id.*, at 26. Similarly, the Court of Appeals concluded that "*Cruzan*, by recognizing a liberty interest that includes the refusal of artificial provision of life-sustaining food and water, necessarily recognize[d] a liberty interest in hastening one's own death." 79 F. 3d, at 816.

The right assumed in *Cruzan*, however, was not simply deduced from abstract concepts of personal autonomy. Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation's history and constitutional traditions. The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection. Indeed, the two acts are widely and reasonably regarded as quite distinct. See *Quill* v. *Vacco*, *post*, at 800–808. In *Cruzan* itself, we recognized that most States outlawed assisted suicide—and even more do today—and we certainly gave no intimation that the right to refuse unwanted medical treatment could be somehow transmuted into a right to assistance in committing suicide. 497 U. S., at 280.

Respondents also rely on *Casey.* There, the Court's opinion concluded that "the essential holding of *Roe* v. *Wade*[, 410 U. S. 113 (1973),] should be retained and once again reaffirmed." 505 U. S., at 846. We held, first, that a woman has a right, before her fetus is viable, to an abortion "without undue interference from the State"; second, that States may restrict postviability abortions, so long as exceptions are made to protect a woman's life and health; and third, that the State has legitimate interests throughout a pregnancy in protecting the health of the woman and the life of the unborn child. *Ibid.* In reaching this conclusion, the opinion discussed in some detail this Court's substantive-due-process tradition of interpreting the Due Process Clause to protect certain fundamental rights and "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," and noted that many of those rights and liberties "involv[e] the most intimate and personal choices a person may make in a lifetime." *Id.*, at 851.

The Court of Appeals, like the District Court, found *Casey* " 'highly instructive' " and " 'almost prescriptive' " for determining " 'what liberty interest may inhere in a terminally ill person's choice to commit suicide' ":

> "Like the decision of whether or not to have an abortion, the decision how and when to die is one of 'the most intimate and personal choices a person may make in a lifetime,' a choice 'central to personal dignity and autonomy.' " 79 F. 3d, at 813–814.

Similarly, respondents emphasize the statement in *Casey* that:

> "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they

> formed under compulsion of the State." 505 U. S., at 851.

Brief for Respondents 12. By choosing this language, the Court's opinion in *Casey* described, in a general way and in light of our prior cases, those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment.[19] The opinion moved from the recognition that liberty necessarily includes freedom of conscience and belief about ultimate considerations to the observation that "though the abortion decision may originate within the zone of conscience and belief, it is *more than a philosophic exercise.*" *Casey,* 505 U. S., at 852 (emphasis added). That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected, *San An-*

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[19] See *Moore* v. *East Cleveland,* 431 U. S. 494, 503 (1977) ("[T]he Constitution protects the sanctity of the family *precisely because* the institution of the family is deeply rooted in this Nation's history and tradition" (emphasis added)); *Griswold* v. *Connecticut,* 381 U. S. 479, 485–486 (1965) (intrusions into the "sacred precincts of marital bedrooms" offend rights "older than the Bill of Rights"); *id.,* at 495–496 (Goldberg, J., concurring) (the law in question "disrupt[ed] the traditional relation of the family—a relation as old and as fundamental as our entire civilization"); *Loving* v. *Virginia,* 388 U. S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness"); *Turner* v. *Safley,* 482 U. S. 78, 95 (1987) ("[T]he decision to marry is a fundamental right"); *Roe* v. *Wade,* 410 U. S. 113, 140 (1973) (stating that at the founding and throughout the 19th century, "a woman enjoyed a substantially broader right to terminate a pregnancy"); *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U. S. 535, 541 (1942) ("Marriage and procreation are fundamental"); *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535 (1925); *Meyer* v. *Nebraska,* 262 U. S. 390, 399 (1923) (liberty includes "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men").

tonio Independent School Dist. v. *Rodriguez,* 411 U. S. 1, 33–35 (1973), and *Casey* did not suggest otherwise.

The history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, our decisions lead us to conclude that the asserted "right" to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause. The Constitution also requires, however, that Washington's assisted-suicide ban be rationally related to legitimate government interests. See *Heller* v. *Doe,* 509 U. S. 312, 319–320 (1993); *Flores,* 507 U. S., at 305. This requirement is unquestionably met here. As the court below recognized, 79 F. 3d, at 816–817,[20] Washington's assisted-suicide ban implicates a number of state interests.[21] See 49 F. 3d, at 592–593; Brief for State of California et al. as *Amici Curiae* 26–29; Brief for United States as *Amicus Curiae* 16–27.

First, Washington has an "unqualified interest in the preservation of human life." *Cruzan,* 497 U. S., at 282. The State's prohibition on assisted suicide, like all homicide laws, both reflects and advances its commitment to this interest. See *id.,* at 280; Model Penal Code § 210.5, Comment 5, at 100 ("[T]he interests in the sanctity of life that are represented by the criminal homicide laws are threatened by one who expresses a willingness to participate in taking the life of another").[22] This interest is symbolic and aspirational as well as practical:

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[20] The court identified and discussed six state interests: (1) preserving life; (2) preventing suicide; (3) avoiding the involvement of third parties and use of arbitrary, unfair, or undue influence; (4) protecting family members and loved ones; (5) protecting the integrity of the medical profession; and (6) avoiding future movement toward euthanasia and other abuses. 79 F. 3d, at 816–832.

[21] Respondents also admit the existence of these interests, Brief for Respondents 28–39, but contend that Washington could better promote and protect them through regulation, rather than prohibition, of physician-assisted suicide. Our inquiry, however, is limited to the question whether the State's prohibition is rationally related to legitimate state interests.

> "While suicide is no longer prohibited or penalized, the ban against assisted suicide and euthanasia shores up the notion of limits in human relationships. It reflects the gravity with which we view the decision to take one's own life or the life of another, and our reluctance to encourage or promote these decisions." New York Task Force 131–132.

Respondents admit that "[t]he State has a real interest in preserving the lives of those who can still contribute to society and have the potential to enjoy life." Brief for Respondents 35, n. 23. The Court of Appeals also recognized Washington's interest in protecting life, but held that the "weight" of this interest depends on the "medical condition and the wishes of the person whose life is at stake." 79 F. 3d, at 817. Washington, however, has rejected this sliding-scale approach and, through its assisted-suicide ban, insists that all persons' lives, from beginning to end, regardless of physical or mental condition, are under the full protection of the law. See *United States* v. *Rutherford,* 442 U. S. 544, 558 (1979) (". . . Congress could reasonably have determined to protect the terminally ill, no less than other patients, from the vast range of self-styled panaceas that inventive minds can devise"). As we have previously affirmed, the States "may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy," *Cruzan,*

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[22] The States express this commitment by other means as well:

"[N]early all states expressly disapprove of suicide and assisted suicide either in statutes dealing with durable powers of attorney in health-care situations, or in 'living will' statutes. In addition, all states provide for the involuntary commitment of persons who may harm themselves as the result of mental illness, and a number of states allow the use of nondeadly force to thwart suicide attempts." *People* v. *Kevorkian,* 447 Mich., at 478–479, and nn. 53–56, 527 N. W. 2d, at 731–732, and nn. 53–56.

supra, at 282. This remains true, as *Cruzan* makes clear, even for those who are near death.

Relatedly, all admit that suicide is a serious public-health problem, especially among persons in otherwise vulnerable groups. See Washington State Dept. of Health, Annual Summary of Vital Statistics 1991, pp. 29–30 (Oct. 1992) (suicide is a leading cause of death in Washington of those between the ages of 14 and 54); New York Task Force 10, 23–33 (suicide rate in the general population is about one percent, and suicide is especially prevalent among the young and the elderly). The State has an interest in preventing suicide, and in studying, identifying, and treating its causes. See 79 F. 3d, at 820; *id.,* at 854 (Beezer, J., dissenting) ("The state recognizes suicide as a manifestation of medical and psychological anguish"); Marzen 107–146.

Those who attempt suicide—terminally ill or not—often suffer from depression or other mental disorders. See New York Task Force 13–22, 126–128 (more than 95% of those who commit suicide had a major psychiatric illness at the time of death; among the terminally ill, uncontrolled pain is a "risk factor" because it contributes to depression); Physician-Assisted Suicide and Euthanasia in the Netherlands: A Report of Chairman Charles T. Canady to the Subcommittee on the Constitution of the House Committee on the Judiciary, 104th Cong., 2d Sess., 10–11 (Comm. Print 1996); cf. Back, Wallace, Starks, & Pearlman, Physician-Assisted Suicide and Euthanasia in Washington State, 275 JAMA 919, 924 (1996) ("[I]ntolerable physical symptoms are not the reason most patients request physician-assisted suicide or euthanasia"). Research indicates, however, that many people who request physician-assisted suicide withdraw that request if their depression and pain are treated. H. Hendin, Seduced by Death: Doctors, Patients and the Dutch Cure 24–25 (1997) (suicidal, terminally ill patients "usually respond well to treatment for depressive illness and pain medication and are then grateful to be alive"); New York Task Force 177–178.

The New York Task Force, however, expressed its concern that, because depression is difficult to diagnose, physicians and medical professionals often fail to respond adequately to seriously ill patients' needs. *Id.*, at 175. Thus, legal physician-assisted suicide could make it more difficult for the State to protect depressed or mentally ill persons, or those who are suffering from untreated pain, from suicidal impulses.

The State also has an interest in protecting the integrity and ethics of the medical profession. In contrast to the Court of Appeals' conclusion that "the integrity of the medical profession would [not] be threatened in any way by [physician-assisted suicide]," 79 F. 3d, at 827, the American Medical Association, like many other medical and physicians' groups, has concluded that "[p]hysician-assisted suicide is fundamentally incompatible with the physician's role as healer." American Medical Association, Code of Ethics § 2.211 (1994); see Council on Ethical and Judicial Affairs, Decisions Near the End of Life, 267 JAMA 2229, 2233 (1992) ("[T]he societal risks of involving physicians in medical interventions to cause patients' deaths is too great"); New York Task Force 103–109 (discussing physicians' views). And physician-assisted suicide could, it is argued, undermine the trust that is essential to the doctor-patient relationship by blurring the time-honored line between healing and harming. Assisted Suicide in the United States, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 104th Cong., 2d Sess., 355–356 (1996) (testimony of Dr. Leon R. Kass) ("The patient's trust in the doctor's whole-hearted devotion to his best interests will be hard to sustain").

Next, the State has an interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes. The Court of Appeals dismissed the State's concern that disadvantaged persons might be pressured into physician-assisted suicide as "ludicrous on its face." 79 F. 3d, at 825. We have recognized, however, the real risk of subtle coercion and undue influence in end-of-life situations. *Cruzan,* 497 U. S., at 281. Similarly, the New York Task Force warned that "[l]egalizing physician-assisted suicide would pose profound risks to many individuals who are ill and vulnerable. . . . The risk of harm is greatest for the many individuals in our society whose autonomy and well-being are already compromised by poverty, lack of access to good medical care, advanced age, or membership in a stigmatized social group." New York Task Force 120; see *Compassion in Dying,* 49 F. 3d, at 593 ("An insidious bias against the handicapped—again coupled with a cost-saving mentality—makes them especially in need of Washington's statutory protection"). If physician-assisted suicide were permitted, many might resort to it to spare their families the substantial financial burden of end-of-life health-care costs.

The State's interest here goes beyond protecting the vulnerable from coercion; it extends to protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes, and "societal indifference." 49 F. 3d, at 592. The State's assisted-suicide ban reflects and reinforces its policy that the lives of terminally ill, disabled, and elderly people must be no less valued than the lives of the young and healthy, and that a seriously disabled person's suicidal impulses should be interpreted and treated the same way as anyone else's. See New York Task Force 101–102; Physician-Assisted Suicide and Euthanasia in the Netherlands: A Report of Chairman Charles T. Canady, *supra,* at 9, 20 (discussing prejudice toward the disabled and the negative messages euthanasia and assisted suicide send to handicapped patients).

Finally, the State may fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia. The Court of Appeals struck down

Washington's assisted-suicide ban only "as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors." 79 F. 3d, at 838. Washington insists, however, that the impact of the court's decision will not and cannot be so limited. Brief for Petitioners 44–47. If suicide is protected as a matter of constitutional right, it is argued, "every man and woman in the United States must enjoy it." *Compassion in Dying,* 49 F. 3d, at 591; see *Kevorkian,* 447 Mich., at 470, n. 41, 527 N. W. 2d, at 727–728, n. 41. The Court of Appeals' decision, and its expansive reasoning, provide ample support for the State's concerns. The court noted, for example, that the "decision of a duly appointed surrogate decision maker is for all legal purposes the decision of the patient himself," 79 F. 3d, at 832, n. 120; that "in some instances, the patient may be unable to self-administer the drugs and . . . administration by the physician . . . may be the only way the patient may be able to receive them," *id.,* at 831; and that not only physicians, but also family members and loved ones, will inevitably participate in assisting suicide, *id.,* at 838, n. 140. Thus, it turns out that what is couched as a limited right to "physician-assisted suicide" is likely, in effect, a much broader license, which could prove extremely difficult to police and contain.[23] Washington's ban on assisting suicide prevents such erosion.

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[23] JUSTICE SOUTER concludes that "[t]he case for the slippery slope is fairly made out here, not because recognizing one due process right would leave a court with no principled basis to avoid recognizing another, but because there is a plausible case that the right claimed would not be readily containable by reference to facts about the mind that are matters of difficult judgment, or by gatekeepers who are subject to temptation, noble or not." *Post,* at 785 (opinion concurring in judgment). We agree that the case for a slippery slope has been made out, but—bearing in mind Justice Cardozo's observation of "[t]he tendency of a principle to expand itself to the limit of its logic," The Nature of the Judicial Process 51 (1932)—we also recognize the reasonableness of the widely expressed

This concern is further supported by evidence about the practice of euthanasia in the Netherlands. The Dutch government's own study revealed that in 1990, there were 2,300 cases of voluntary euthanasia (defined as "the deliberate termination of another's life at his request"), 400 cases of assisted suicide, and more than 1,000 cases of euthanasia without an explicit request. In addition to these latter 1,000 cases, the study found an additional 4,941 cases where physicians administered lethal morphine overdoses without the patients' explicit consent. Physician-Assisted Suicide and Euthanasia in the Netherlands: A Report of Chairman Charles T. Canady, *supra,* 12–13 (citing Dutch study). This study suggests that, despite the existence of various reporting procedures, euthanasia in the Netherlands has not been limited to competent, terminally ill adults who are enduring physical suffering, and that regulation of the practice may not have prevented abuses in cases involving vulnerable persons, including severely disabled neonates and elderly persons suffering from dementia. *Id.,* at 16–21; see generally C. Gomez, Regulating Death: Euthanasia and the Case of the Netherlands (1991); H. Hendin, Seduced By Death: Doctors, Patients, and the Dutch Cure (1997). The New York Task Force, citing the Dutch experience, observed that "assisted suicide and euthanasia are closely linked," New York Task Force 145, and concluded that the "risk of . . . abuse is neither speculative nor distant," *id.,* at 134. Washington, like most

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skepticism about the lack of a principled basis for confining the right. See Brief for United States as *Amicus Curiae* 26 ("Once a legislature abandons a categorical prohibition against physician assisted suicide, there is no obvious stopping point"); Brief for Not Dead Yet et al. as *Amici Curiae* 21–29; Brief for Bioethics Professors as *Amici Curiae* 23–26; Report of the Council on Ethical and Judicial Affairs, App. 133, 140 ("[I]f assisted suicide is permitted, then there is a strong argument for allowing euthanasia"); New York Task Force 132; Kamisar, The "Right to Die": On Drawing (and Erasing) Lines, 35 Duquesne L. Rev. 481 (1996); Kamisar, Against Assisted Suicide—Even in a Very Limited Form, 72 U. Det. Mercy L. Rev. 735 (1995).

other States, reasonably ensures against this risk by banning, rather than regulating, assisted suicide. See *United States* v. *12 200-ft. Reels of Super 8MM. Film*, 413 U. S. 123, 127 (1973) ("Each step, when taken, appear[s] a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance").

We need not weigh exactingly the relative strengths of these various interests. They are unquestionably important and legitimate, and Washington's ban on assisted suicide is at least reasonably related to their promotion and protection. We therefore hold that Wash. Rev. Code § 9A.36.060(1) (1994) does not violate the Fourteenth Amendment, either on its face or "as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors." 79 F. 3d, at 838.[24]

* * *

Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society. The decision of the en banc Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

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[24] JUSTICE STEVENS states that "the Court does conceive of respondents' claim as a facial challenge—addressing not the application of the statute to a particular set of plaintiffs before it, but the constitutionality of the statute's categorical prohibition . . . ." *Post*, at 740 (opinion concurring in judgments). We emphasize that we today reject the Court of Appeals' specific holding that the statute is unconstitutional "as applied" to a particular class. See n. 6, *supra*. JUSTICE STEVENS agrees with this holding, see *post*, at 750, but would not "foreclose the possibility that an individual plaintiff seeking to hasten her death, or a doctor whose assistance was sought, could prevail in a more particularized challenge," *ibid.* Our opinion does not absolutely foreclose such a claim. However, given our holding that the Due Process Clause of the Fourteenth Amendment does not provide heightened protection to the asserted liberty interest in ending one's life with a physician's assistance, such a claim would have to be quite different from the ones advanced by respondents here.

It is so ordered.

JUSTICE O'CONNOR, concurring.* †

Death will be different for each of us. For many, the last days will be spent in physical pain and perhaps the despair that accompanies physical deterioration and a loss of control of basic bodily and mental functions. Some will seek medication to alleviate that pain and other symptoms.

The Court frames the issue in *Washington* v. *Glucksberg* as whether the Due Process Clause of the Constitution protects a "right to commit suicide which itself includes a right to assistance in doing so," *ante,* at 723, and concludes that our Nation's history, legal traditions, and practices do not support the existence of such a right. I join the Court's opinions because I agree that there is no generalized right to "commit suicide." But respondents urge us to address the narrower question whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death. I see no need to reach that question in the context of the facial challenges to the New York and Washington laws at issue here. See *ibid.* ("The Washington statute at issue in this case prohibits 'aid[ing] another person to attempt suicide,'. . . and, thus, the question before us is whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so"). The parties and *amici* agree that in these States a patient who is suffering from a terminal illness and who is experiencing great pain has no legal barriers to obtaining medication, from qualified physicians, to alleviate that suffering, even to the point of causing unconsciousness and hastening death. See Wash. Rev. Code § 70.122.010 (1994); Brief for Petitioners in No. 95–1858, p. 15, n. 9; Brief for Respondents in No. 95–1858, p. 15. In this light, even assuming that we would recognize such an interest, I agree that the State's interests in protecting those who are not truly competent or facing imminent death, or those whose decisions to hasten death would not truly be voluntary, are sufficiently weighty to justify a prohibition against physician-assisted suicide. *Ante,* at 731–733; *post,* at 747 (STEVENS, J., concurring in judgments); *post,* at 782–787 (SOUTER, J., concurring in judgment).

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*JUSTICE GINSBURG concurs in the Court's judgments substantially for the reasons stated in this opinion. JUSTICE BREYER joins this opinion except insofar as it joins the opinions of the Court.

†[This opinion applies also to No. 95–1858, *Vacco et al.* v. *Quill et al., post,* p. 793.]

Every one of us at some point may be affected by our own or a family member's terminal illness. There is no reason to think the democratic process will not strike the proper balance between the interests of terminally ill, mentally competent individuals who would seek to end their suffering and the State's interests in protecting those who might seek to end life mistakenly or under pressure. As the Court recognizes, States are presently undertaking extensive and serious evaluation of physician-assisted suicide and other related issues. *Ante,* at 716–718; see *post,* at 785–788 (SOUTER, J., concurring in judgment). In such circumstances, "the . . . challenging task of crafting appropriate procedures for safeguarding . . . liberty interests is entrusted to the 'laboratory' of the States . . . in the first instance." *Cruzan* v. *Director, Mo. Dept. of Health,* 497 U. S. 261, 292 (1990) (O'CONNOR, J., concurring) (citing *New State Ice Co.* v. *Liebmann,* 285 U. S. 262, 311 (1932)).

In sum, there is no need to address the question whether suffering patients have a constitutionally cognizable interest in obtaining relief from the suffering that they may experience in the last days of their lives. There is no dispute that dying patients in Washington and New York can obtain palliative care, even when doing so would hasten their deaths. The difficulty in defining terminal illness and the risk that a dying patient's request for assistance in ending his or her life might not be truly voluntary justifies the prohibitions on assisted suicide we uphold here.

JUSTICE STEVENS, concurring in the judgments.*

The Court ends its opinion with the important observation that our holding today is fully consistent with a continuation of the vigorous debate about the "morality, legality, and practicality of physician-assisted suicide" in a democratic society. *Ante*, at 735. I write separately to make it clear that there is also room for further debate about the limits that the Constitution places on the power of the States to punish the practice.

I

The morality, legality, and practicality of capital punishment have been the subject of debate for many years. In 1976, this Court upheld the constitutionality of the practice in cases coming to us from Georgia,[1] Florida,[2] and Texas.[3] In those cases we concluded that a State does have the power to place a lesser value on some lives than on others; there is no absolute requirement that a State treat all human life as having an equal right to preservation. Because the state legislatures had sufficiently narrowed the category of lives that the State could terminate, and had enacted special procedures to ensure that the defendant belonged in that limited category, we concluded that the statutes were not unconstitutional on their face. In later cases coming to us from each

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*[This opinion applies also to No. 95–1858, *Vacco et al.* v. *Quill et al.*, *post*, p. 793.]

[1] *Gregg* v. *Georgia*, 428 U. S. 153 (1976).

[2] *Proffitt* v. *Florida*, 428 U. S. 242 (1976).

[3] *Jurek* v. *Texas*, 428 U. S. 262 (1976).

of those States, however, we found that some applications of the statutes were unconstitutional.[4]

Today, the Court decides that Washington's statute prohibiting assisted suicide is not invalid "on its face," that is to say, in all or most cases in which it might be applied.[5] That holding, however, does not foreclose the possibility that some applications of the statute might well be invalid.

As originally filed, *Washington* v. *Glucksberg* presented a challenge to the Washington statute on its face and as it applied to three terminally ill, mentally competent patients and to four physicians who treat terminally ill patients. After the District Court issued its opinion holding that the statute placed an undue burden on the right to commit physician-assisted suicide, see *Compassion in Dying* v. *Washington*, 850 F. Supp. 1454, 1462, 1465 (WD Wash. 1994), the three patients died. Although the Court of Appeals considered the constitutionality of the statute "as applied to the prescription of life-ending medication for use by terminally ill, competent adult patients who wish to hasten their deaths," *Compassion in Dying* v. *Washington*, 79 F. 3d 790, 798 (CA9 1996), the court did not have before it any individual plaintiff seeking to hasten her death or any doctor who was threatened with prosecution for assisting in the suicide of a particular patient; its analysis and eventual holding that the statute was unconstitutional was not limited to a particular set of plaintiffs before it.

The appropriate standard to be applied in cases making facial challenges to state statutes has been the subject of debate within this Court. See *Janklow* v. *Planned Parenthood, Sioux Falls Clinic*, 517 U. S. 1174 (1996). Upholding the validity of the federal Bail Reform Act of 1984, the Court stated in *United States* v. *Salerno*, 481 U. S. 739 (1987), that a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Id.*, at 745.[6] I do not believe the Court has ever actually applied such a strict standard,[7] even in *Salerno* itself, and the Court does not appear to apply *Salerno* here. Nevertheless, the Court does conceive of respondents' claim as a facial challenge—addressing not the application of the statute to a particular set of plaintiffs before it, but the constitutionality of the statute's categorical prohibition against "aid[ing] another person to attempt suicide." *Ante*, at 723 (internal quotation marks omitted) (citing Wash. Rev. Code § 9A.36.060(1) (1994)). Accordingly, the Court requires the plaintiffs to show that the interest in liberty protected by the Fourteenth Amendment "includes a right to commit suicide which itself includes a right to assistance in doing so." *Ante*, at 723.

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[4] See, *e. g., Godfrey* v. *Georgia*, 446 U. S. 420 (1980); *Enmund* v. *Florida*, 458 U. S. 782 (1982); *Penry* v. *Lynaugh*, 492 U. S. 302 (1989).

[5] See *ante*, at 709, n. 6.

History and tradition provide ample support for refusing to recognize an open-ended constitutional right to commit suicide. Much more than the State's paternalistic interest in protecting the individual from the irrevocable consequences of an ill-advised decision motivated by temporary concerns is at stake. There is truth in John Donne's observation that "No man is an island."[8] The State has an interest in preserving and fostering the benefits that every human being may provide to the community—a community that thrives on the exchange of ideas, expressions of affection, shared memories, and humorous incidents, as well as on the material contributions that its members create and support. The value to others of a person's life is far too precious to allow the individual to claim a constitutional entitlement to complete autonomy in making a decision to end that life. Thus, I fully agree with the Court that the "liberty" protected by the Due Process Clause does not include a categorical "right to commit suicide which itself includes a right to assistance in doing so." *Ibid.*

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[6] If the Court had actually applied the *Salerno* standard in this action, it would have taken only a few paragraphs to identify situations in which the Washington statute could be validly enforced. In *Salerno* itself, the Court would have needed only to look at whether the statute could be constitutionally applied to the arrestees before it; any further analysis would have been superfluous. See Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235, 239–240 (1994) (arguing that if the *Salerno* standard were taken literally, a litigant could not succeed in her facial challenge unless she also succeeded in her as applied challenge).

[7] In other cases and in other contexts, we have imposed a significantly lesser burden on the challenger. The most lenient standard that we have applied requires the challenger to establish that the invalid applications of a statute "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick* v. *Oklahoma*, 413 U. S. 601, 615 (1973). As the Court's opinion demonstrates, Washington's statute prohibiting assisted suicide has a "plainly legitimate sweep." While that demonstration provides a sufficient justification for rejecting respondents' facial challenge, it does not mean that every application of the statute should or will be upheld.

But just as our conclusion that capital punishment is not always unconstitutional did not preclude later decisions holding that it is sometimes impermissibly cruel, so is it equally clear that a decision upholding a general statutory prohibition of assisted suicide does not mean that every possible application of the statute would be valid. A State, like Washington, that has authorized the death penalty, and thereby has concluded that the sanctity of human life does not require that it always be preserved, must acknowledge that there are situations in which an interest in hastening death is legitimate. Indeed, not only is that interest sometimes legitimate, I am also convinced that there are times when it is entitled to constitutional protection.

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[8] "Who casts not up his eye to the sun when it rises? but who takes off his eye from a comet when that breaks out? Who bends not his ear to any bell which upon any occasion rings? but who can remove it from that bell which is passing a piece of himself out of this world? No man is an island, entire of itself; every man is a piece of the continent, a part of the main. If a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as if a manor of thy friend's or of thine own were; any man's death diminishes me, because I am involved in mankind; and therefore never send to know for whom the bell tolls; it tolls for thee." J. Donne, Meditation No. 17, Devotions Upon Emergent Occasions (1623) (http://www.kfu.com/~pl...om_the_bell_tolls.html).

II

In *Cruzan* v. *Director, Mo. Dept. of Health,* 497 U. S. 261 (1990), the Court assumed that the interest in liberty protected by the Fourteenth Amendment encompassed the right of a terminally ill patient to direct the withdrawal of life-sustaining treatment. As the Court correctly observes today, that assumption "was not simply deduced from abstract concepts of personal autonomy." *Ante,* at 725. Instead, it was supported by the common-law tradition protecting the individual's general right to refuse unwanted medical treatment. *Ibid.* We have recognized, however, that this common-law right to refuse treatment is neither absolute nor always sufficiently weighty to overcome valid countervailing state interests. As Justice Brennan pointed out in his *Cruzan* dissent, we have upheld legislation imposing punishment on persons refusing to be vaccinated, 497 U. S., at 312, n. 12, citing *Jacobson* v. *Massachusetts,* 197 U. S. 11, 26–27 (1905), and as JUSTICE SCALIA pointed out in his concurrence, the State ordinarily has the right to interfere with an attempt to commit suicide by, for example, forcibly placing a bandage on a self-inflicted wound to stop the flow of blood. 497 U. S., at 298. In most cases, the individual's constitutionally protected interest in his or her own physical autonomy, including the right to refuse unwanted medical treatment, will give way to the State's interest in preserving human life.

Cruzan, however, was not the normal case. Given the irreversible nature of her illness and the progressive character of her suffering,[9] Nancy Cruzan's interest in refusing medical care was incidental to her more basic interest in controlling the manner and timing of her death. In finding that her best interests would be served by cutting off the nourishment that kept her alive, the trial court did more than simply vindicate Cruzan's interest in refusing medical treatment; the court, in essence, authorized affirmative conduct that would hasten her death. When this Court reviewed the case and upheld Missouri's requirement that there be clear and convincing evidence establishing Nancy Cruzan's intent to have life-sustaining nourishment withdrawn, it made two important assumptions: (1) that there was a "liberty interest" in refusing unwanted treatment protected by the Due Process Clause; and (2) that this liberty interest did not "end the inquiry" because it might be outweighed by relevant state interests. *Id.*, at 279. I agree with both of those assumptions, but I insist that the source of Nancy Cruzan's right to refuse treatment was not just a common-law rule. Rather, this right is an aspect of a far broader and more basic concept of freedom that is even older than the common law.[10] This freedom embraces not merely a person's right to refuse a particular kind of unwanted treatment, but also her interest in dignity, and in determining the character of the memories that will survive long after her death.[11] In recognizing that the State's interests did not outweigh Nancy Cruzan's liberty interest in refusing medical treatment, *Cruzan* rested not simply on the common-law right to refuse medical treatment, but—at least implicitly—on the even more fundamental right to make this "deeply personal decision," *id.*, at 289 (O'CONNOR, J., concurring).

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[9] See 497 U. S., at 332, n. 2.

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[10] "[N]either the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects. The relevant constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen. The relevant state laws either create property rights, or they curtail the freedom of the citizen who must live in an ordered society. Of course, law is essential to the exercise and enjoyment of individual liberty in a complex society. But it is not the source of liberty, and surely not the exclusive source.

"I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or privileges conferred by specific laws or regulations." *Meachum* v. *Fano*, 427 U. S. 215, 230 (1976) (STEVENS, J., dissenting).

[11] "Nancy Cruzan's interest in life, no less than that of any other person, includes an interest in how she will be thought of after her death by those whose opinions mattered to her. There can be no doubt that her life made her dear to her family and to others. How she dies will affect how that

Thus, the common-law right to protection from battery, which included the right to refuse medical treatment in most circumstances, did not mark "the outer limits of the substantive sphere of liberty" that supported the Cruzan family's decision to hasten Nancy's death. *Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U. S. 833, 848 (1992). Those limits have never been precisely defined. They are generally identified by the importance and character of the decision confronted by the individual, *Whalen* v. *Roe,* 429 U. S. 589, 599–600, n. 26 (1977). Whatever the outer limits of the concept may be, it definitely includes protection for matters "central to personal dignity and autonomy." *Casey,* 505 U. S., at 851. It includes

> "the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny. The Court has referred to such decisions as implicating 'basic values,' as being 'fundamental,' and as being dignified by history and tradition. The character of the Court's language in these cases brings to mind the origins of the American heritage of freedom—the

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life is remembered." *Cruzan* v. *Director, Mo. Dept. of Health,* 497 U. S. 261, 344 (1990) (STEVENS, J., dissenting).

"Each of us has an interest in the kind of memories that will survive after death. To that end, individual decisions are often motivated by their impact on others. A member of the kind of family identified in the trial court's findings in this case would likely have not only a normal interest in minimizing the burden that her own illness imposes on others, but also an interest in having their memories of her filled predominantly with thoughts about her past vitality rather than her current condition." *Id.,* at 356.

> abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable." *Fitzgerald* v. *Porter Memorial Hospital*, 523 F. 2d 716, 719–720 (CA7 1975) (footnotes omitted), cert. denied, 425 U. S. 916 (1976).

The *Cruzan* case demonstrated that some state intrusions on the right to decide how death will be encountered are also intolerable. The now-deceased plaintiffs in this action may in fact have had a liberty interest even stronger than Nancy Cruzan's because, not only were they terminally ill, they were suffering constant and severe pain. Avoiding intolerable pain and the indignity of living one's final days incapacitated and in agony is certainly "[a]t the heart of [the] liberty . . . to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Casey*, 505 U. S., at 851.

While I agree with the Court that *Cruzan* does not decide the issue presented by these cases, *Cruzan* did give recognition, not just to vague, unbridled notions of autonomy, but to the more specific interest in making decisions about how to confront an imminent death. Although there is no absolute right to physician-assisted suicide, *Cruzan* makes it clear that some individuals who no longer have the option of deciding whether to live or to die because they are already on the threshold of death have a constitutionally protected interest that may outweigh the State's interest in preserving life at all costs. The liberty interest at stake in a case like this differs from, and is stronger than, both the common-law right to refuse medical treatment and the unbridled interest in deciding whether to live or die. It is an interest in deciding how, rather than whether, a critical threshold shall be crossed.

III

The state interests supporting a general rule banning the practice of physician-assisted suicide do not have the same force in all cases. First and foremost of these interests is the " 'unqualified interest in the preservation of human life,' " *ante,* at 728 (quoting *Cruzan,* 497 U. S., at 282), which is equated with " 'the sanctity of life,' " *ante,* at 728 (quoting American Law Institute, Model Penal Code § 210.5, Comment 5, p. 100 (Official Draft and Revised Comments 1980)). That interest not only justifies—it commands—maximum protection of every individual's interest in remaining alive, which in turn commands the same protection for decisions about whether to commence or to terminate life-support systems or to administer pain medication that may hasten death. Properly viewed, however, this interest is not a collective interest that should always outweigh the interests of a person who because of pain, incapacity, or sedation finds her life intolerable, but rather, an aspect of individual freedom.

Many terminally ill people find their lives meaningful even if filled with pain or dependence on others. Some find value in living through suffering; some have an abiding desire to witness particular events in their families' lives; many believe it a sin to hasten death. Individuals of different religious faiths make different judgments and choices about whether to live on under such circumstances. There are those who will want to continue aggressive treatment; those who would prefer terminal sedation; and those who will seek withdrawal from life-support systems and death by gradual starvation and dehydration. Although as a general matter the State's interest in the contributions each person may make to society outweighs the person's interest in ending her life, this interest does not have the same force for a terminally ill patient faced not with the choice of whether to live, only of how to die. Allowing the individual, rather than the State, to make judgments " 'about the "quality" of life that a particular individual may enjoy,' " *ante,* at 729 (quoting *Cruzan,* 497 U. S., at 282), does not mean that the lives of terminally ill, disabled people have less value than the lives of those who are healthy, see *ante,* at 732. Rather, it gives proper recognition to the individual's interest in choosing a final chapter that accords with her life story, rather than one that demeans her values and poisons memories of her. See Brief for Bioethicists as *Amici Curiae* 11; see also R. Dworkin, Life's Dominion 213 (1993) ("Whether it is in someone's best interests that his life end in one way rather than another depends on so much else that is special about him—about the shape and character of his life and his own sense of his integrity and critical interests—that no uniform collective decision can possibly hope to serve everyone even decently").

Similarly, the State's legitimate interests in preventing suicide, protecting the vulnerable from coercion and abuse, and preventing euthanasia are less significant in this context. I agree that the State has a compelling interest in preventing persons from committing suicide because of depression or coercion by third parties. But the State's legitimate interest in preventing abuse does not apply to an individual who is not victimized by abuse, who is not suffering from depression, and who makes a rational and voluntary decision to seek assistance in dying. Although, as the New York Task Force report discusses, diagnosing depression and other mental illness is not always easy, mental health workers and other professionals expert in working with dying patients can help patients cope with depression and pain, and help patients assess their options. See Brief for Washington State Psychological Association et al. as *Amici Curiae* 8–10.

Relatedly, the State and *amici* express the concern that patients whose physical pain is inadequately treated will be more likely to request assisted suicide. Encouraging the development and ensuring the availability of adequate pain treatment is of utmost importance; palliative care, however, cannot alleviate all pain and suffering. See Orentlicher, Legalization of Physician Assisted Suicide: A Very Modest Revolution, 38 Boston College L. Rev. (Galley, p. 8) (1997) ("Greater use of palliative care would reduce the demand for assisted suicide, but it will not eliminate [it]"); see also Brief for Coalition of Hospice Professionals as *Amici Curiae* 8 (citing studies showing that "[a]s death becomes more imminent, pain and suffering become progressively more difficult to treat"). An individual adequately informed of the care alternatives thus might make a rational choice for assisted suicide. For such an individual, the State's interest in preventing potential abuse and mistake is only minimally implicated.

The final major interest asserted by the State is its interest in preserving the traditional integrity of the medical profession. The fear is that a rule permitting physicians to assist in suicide is inconsistent with the perception that they serve their patients solely as healers. But for some patients, it would be a physician's refusal to dispense medication to ease their suffering and make their death tolerable and dignified that would be inconsistent with the healing role. See Block & Billings, Patient Request to Hasten Death, 154 Archives Internal Med. 2039, 2045 (1994) (A doctor's refusal to hasten death "may be experienced by the [dying] patient as an abandonment, a rejection, or an expression of inappropriate paternalistic authority"). For doctors who have longstanding relationships with their patients, who have given their patients advice on alternative treatments, who are attentive to their patient's individualized needs, and who are knowledgeable about pain symptom management and palliative care options, see Quill, Death and Dignity, A Case of Individualized Decision Making, 324 New England J. Med. 691–694 (1991), heeding a patient's desire to assist in her suicide would not serve to harm the physician-patient relationship. Furthermore, because physicians are already involved in making decisions that hasten the death of terminally ill patients—through termination of life support, withholding of medical treatment, and terminal sedation—there is in fact significant tension between the traditional view of the physician's role and the actual practice in a growing number of cases.[12]

As the New York State Task Force on Life and the Law recognized, a State's prohibition of assisted suicide is justified by the fact that the "'ideal'" case in which "patients would be screened for depression and offered treatment, effective pain medication would be available, and all patients would have a supportive committed family and doctor" is not the usual case. New York State Task Force on Life and the Law, When Death Is Sought: Assisted Suicide and Euthanasia in the Medical Context 120 (May 1994). Although, as the Court concludes today, these *potential* harms are sufficient to support the State's general public policy against assisted suicide, they will not always outweigh the individual liberty interest of a particular patient. Unlike the Court of Appeals, I would not say as a categorical matter that these state interests are invalid as to the entire class of terminally ill, mentally competent patients. I do not, however, foreclose the possibility that an individual plaintiff seeking to hasten her death, or a doctor whose assistance was sought, could prevail in a more particularized challenge. Future cases will determine whether such a challenge may succeed.

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[12] I note that there is evidence that a significant number of physicians support the practice of hastening death in particular situations. A survey published in the New England Journal of Medicine found that 56% of responding doctors in Michigan preferred legalizing assisted suicide to an explicit ban. Bachman et al., Attitudes of Michigan Physicians and the Public Toward Legalizing Physician-Assisted Suicide and Voluntary Euthanasia, 334 New England J. Med. 303–309 (1996). In a survey of Oregon doctors, 60% of the responding doctors supported legalizing assisted suicide for terminally ill patients. See Lee et al., Legalizing Assisted Suicide—Views of Physicians in Oregon, 335 New England J. Med. 310–315 (1996). Another study showed that 12% of physicians polled in Washington State reported that they had been asked by their terminally ill patients for prescriptions to hasten death, and that, in the year prior to the study, 24% of those physicians had complied with such requests. See Back, Wallace, Starks, & Perlman, Physician-Assisted Suicide and Euthanasia in Washington State, 275 JAMA 919–925 (1996); see also Doukas, Waterhouse, Gorenflo, & Seld, Attitudes and Behaviors on Physician-Assisted Death: A Study of Michigan Oncologists, 13 J. Clinical Oncology 1055 (1995) (reporting that 18% of responding Michigan oncologists reported active participation in assisted suicide); Slome, Moulton, Huffine, Gorter, & Abrams, Physicians' Attitudes Toward Assisted Suicide in AIDS, 5 J. Acquired Immune Deficiency Syndromes 712 (1992) (reporting that 24% of responding physicians who treat AIDS patients would likely grant a patient's request for assistance in hastening death).

IV

In New York, a doctor must respect a competent person's decision to refuse or to discontinue medical treatment even though death will thereby ensue, but the same doctor would be guilty of a felony if she provided her patient assistance in committing suicide.[13] Today we hold that the Equal Protection Clause is not violated by the resulting disparate treatment of two classes of terminally ill people who may have the same interest in hastening death. I agree that the distinction between permitting death to ensue from an underlying fatal disease and causing it to occur by the administration of medication or other means provides a constitutionally sufficient basis for the State's classification.[14] Unlike the Court, however, see *Vacco*, *post*, at 801–802, I am not persuaded that in all cases there will in fact be a significant difference between the intent of the physicians, the patients, or the families in the two situations.

There may be little distinction between the intent of a terminally ill patient who decides to remove her life support and one who seeks the assistance of a doctor in ending her life; in both situations, the patient is seeking to hasten a certain, impending death. The doctor's intent might also be the same in prescribing lethal medication as it is in terminating life support. A doctor who fails to administer medical treatment to one who is dying from a disease could be doing so with an intent to harm or kill that patient. Conversely, a doctor who prescribes lethal medication does not necessarily intend the patient's death—rather that doctor may seek simply to ease the patient's suffering and to comply with her wishes. The illusory character of any differences in intent or causation is confirmed by the fact that the American Medical Association unequivocally endorses the practice of terminal sedation—the administration of sufficient dosages of pain-killing medication to terminally ill patients to protect them from excruciating pain even when it is clear that the time of death will be advanced. The purpose of terminal sedation is to ease the suffering of the patient and comply with her wishes, and the actual cause of death is the administration of heavy doses of lethal sedatives. This same intent and causation may exist when a doctor complies with a patient's request for lethal medication to hasten her death.[15]

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[13] See *Vacco* v. *Quill*, *post*, at 797, nn. 1 and 2.

[14] The American Medical Association recognized this distinction when it supported Nancy Cruzan and continues to recognize this distinction in its support of the States in these cases.

Thus, although the differences the majority notes in causation and intent between terminating life support and assisting in suicide support the Court's rejection of the respondents' facial challenge, these distinctions may be inapplicable to particular terminally ill patients and their doctors. Our holding today in *Vacco* v. *Quill*, *post*, p. 793, that the Equal Protection Clause is not violated by New York's classification, just like our holding in *Washington* v. *Glucksberg* that the Washington statute is not invalid on its face, does not foreclose the possibility that some applications of the New

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[15] If a doctor prescribes lethal drugs to be self-administered by the patient, it is not at all clear that the physician's intent is that the patient "be made dead," *post*, at 802 (internal quotation marks omitted). Many patients prescribed lethal medications never actually take them; they merely acquire some sense of control in the process of dying that the availability of those medications provides. See Back, *supra* n. 12, at 922; see also Quill, 324 New England J. Med., at 693 (describing how some patients fear death less when they feel they have the option of physician-assisted suicide).

York statute may impose an intolerable intrusion on the patient's freedom.

There remains room for vigorous debate about the outcome of particular cases that are not necessarily resolved by the opinions announced today. How such cases may be decided will depend on their specific facts. In my judgment, however, it is clear that the so-called "unqualified interest in the preservation of human life," *Cruzan*, 497 U. S., at 282; *ante*, at 728, is not itself sufficient to outweigh the interest in liberty that may justify the only possible means of preserving a dying patient's dignity and alleviating her intolerable suffering.

JUSTICE SOUTER, concurring in the judgment.

Three terminally ill individuals and four physicians who sometimes treat terminally ill patients brought this challenge to the Washington statute making it a crime "knowingly . . . [to] ai[d] another person to attempt suicide," Wash. Rev. Code § 9A.36.060 (1994), claiming on behalf of both patients and physicians that it would violate substantive due process to enforce the statute against a doctor who acceded to a dying patient's request for a drug to be taken by the patient to commit suicide. The question is whether the statute sets up one of those "arbitrary impositions" or "purposeless restraints" at odds with the Due Process Clause of the Fourteenth Amendment. *Poe* v. *Ullman*, 367 U. S. 497, 543 (1961) (Harlan, J., dissenting). I conclude that the statute's application to the doctors has not been shown to be unconstitutional, but I write separately to give my reasons for analyzing the substantive due process claims as I do, and for rejecting this one.

I

Although the terminally ill original parties have died during the pendency of this case, the four physicians who remain as respondents here[1] continue to request declaratory and injunctive relief for their own benefit in discharging their obligations to other dying patients who request their help.[2] See, *e. g., Southern Pacific Terminal Co.* v. *ICC,* 219 U. S. 498, 515 (1911) (question was capable of repetition yet evading review). The case reaches us on an order granting summary judgment, and we must take as true the undisputed allegations that each of the patients was mentally competent and terminally ill, and that each made a knowing and voluntary choice to ask a doctor to prescribe "medications . . . to be self-administered for the purpose of hastening . . . death." Complaint ¶ 2.3. The State does not dispute that each faced a passage to death more agonizing both mentally and physically, and more protracted over time, than death by suicide with a physician's help, or that each would have chosen such a suicide for the sake of personal dignity, apart even from relief from pain. Each doctor in this case claims to encounter patients like the original plaintiffs who have died, that is, mentally competent, terminally ill, and seeking medical help in "the voluntary self-termination of life." *Id.,* ¶¶ 2.5–2.8. While there may be no unanimity on the physician's professional obligation in such circumstances, I accept here respondents' representation that providing such patients with prescriptions for drugs that go beyond pain relief to hasten death would, in these circumstances, be consistent with standards of medical practice. Hence, I take it to be true, as respondents say, that the Washington statute prevents the exercise of a physician's "best professional judgment to prescribe medications to [such] patients in dosages that would enable them to act to hasten their own deaths." *Id.,* ¶ 2.6; see also App. 35–37, 49–51, 55–57, 73–75.

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[1] A nonprofit corporation known as Compassion in Dying was also a plaintiff and appellee below but is not a party in this Court.

[2] As I will indicate in some detail below, I see the challenge to the statute not as facial but as-applied, and I understand it to be in narrower terms than those accepted by the Court.

In their brief to this Court, the doctors claim not that they ought to have a right generally to hasten patients' imminent deaths, but only to help patients who have made "personal decisions regarding their own bodies, medical care, and, fundamentally, the future course of their lives," Brief for Respondents 12, and who have concluded responsibly and with substantial justification that the brief and anguished remainders of their lives have lost virtually all value to them. Respondents fully embrace the notion that the State must be free to impose reasonable regulations on such physician assistance to ensure that the patients they assist are indeed among the competent and terminally ill and that each has made a free and informed choice in seeking to obtain and use a fatal drug. Complaint ¶ 3.2; App. 28–41.

In response, the State argues that the interest asserted by the doctors is beyond constitutional recognition because it has no deep roots in our history and traditions. Brief for Petitioners 21–25. But even aside from that, without disputing that the patients here were competent and terminally ill, the State insists that recognizing the legitimacy of doctors' assistance of their patients as contemplated here would entail a number of adverse consequences that the Washington Legislature was entitled to forestall. The nub of this part of the State's argument is not that such patients are constitutionally undeserving of relief on their own account, but that any attempt to confine a right of physician assistance to the circumstances presented by these doctors is likely to fail. *Id.*, at 34–35, 44–47.

First, the State argues that the right could not be confined to the terminally ill. Even assuming a fixed definition of that term, the State observes that it is not always possible to say with certainty how long a person may live. *Id.*, at 34. It asserts that "[t]here is no principled basis on which [the right] can be limited to the prescription of medication for terminally ill patients to administer to themselves" when the right's justifying principle is as broad as " 'merciful termination of suffering.'" *Id.*, at 45 (citing Y. Kamisar, Are Laws Against Assisted Suicide Unconstitutional?, Hastings Center Report 32, 36–37 (May–June 1993)). Second, the State argues that the right could not be confined to the mentally competent, observing that a person's competence cannot always be assessed with certainty, Brief for Petitioners 34, and suggesting further that no principled distinction is possible between a competent patient acting independently and a patient acting through a duly appointed and competent surrogate, *id.*, at 46. Next, according to the State, such a right might entail a right to or at least merge in practice into "other forms of life-ending assistance," such as euthanasia. *Id.*, at 46–47. Finally, the State believes that a right to physician assistance could not easily be distinguished from a right to assistance from others, such as friends, family, and other health-care workers. *Id.*, at 47. The State thus argues that recognition of the substantive due process right at issue here would jeopardize the lives of others outside the class defined by the doctors' claim, creating risks of irresponsible suicides and euthanasia, whose dangers are concededly within the State's authority to address.

II

When the physicians claim that the Washington law deprives them of a right falling within the scope of liberty that the Fourteenth Amendment guarantees against denial without due process of law,[3] they are not claiming some sort of procedural defect in the process through which the statute has been enacted or is administered. Their claim, rather, is that the State has no substantively adequate justification for barring the assistance sought by the patient and sought to be offered by the physician. Thus, we are dealing with a claim to one of those rights sometimes described as rights of substantive due process and sometimes as unenumerated rights, in view of the breadth and indeterminacy of the "due process" serving as the claim's textual basis. The doctors accordingly arouse the skepticism of those who find the Due Process Clause an unduly vague or oxymoronic warrant for judicial review of substantive state law, just as they also invoke two centuries of American constitutional practice in recognizing unenumerated, substantive limits on governmental action. Although this practice has neither rested on any single textual basis nor expressed a consistent theory (or, before *Poe* v. *Ullman*, a much articulated one), a brief overview of its history is instructive on two counts. The persistence of substantive due process in our cases points to the legitimacy of the modern justification for such judicial review found in Justice Harlan's dissent in *Poe*,[4] on which I will dwell further on, while the acknowledged failures of some of these cases point with caution to the difficulty raised by the present claim.

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[3] The doctors also rely on the Equal Protection Clause, but that source of law does essentially nothing in a case like this that the Due Process Clause cannot do on its own.

Before the ratification of the Fourteenth Amendment, substantive constitutional review resting on a theory of unenumerated rights occurred largely in the state courts applying state constitutions that commonly contained either due process clauses like that of the Fifth Amendment (and later the Fourteenth) or the textual antecedents of such clauses, repeating Magna Carta's guarantee of "the law of the land."[5] On the basis of such clauses, or of general principles untethered to specific constitutional language, state courts evaluated the constitutionality of a wide range of statutes.

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[4] The status of the Harlan dissent in *Poe* v. *Ullman*, 367 U. S. 497 (1961), is shown by the Court's adoption of its result in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), and by the Court's acknowledgment of its status and adoption of its reasoning in *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 848–849 (1992). See also *Youngberg* v. *Romeo*, 457 U. S. 307, 320 (1982) (citing Justice Harlan's *Poe* dissent as authority for the requirement that this Court balance "the liberty of the individual" and "the demands of an organized society"); *Roberts* v. *United States Jaycees*, 468 U. S. 609, 619 (1984); *Moore* v. *East Cleveland*, 431 U. S. 494, 500–506, and n. 12 (1977) (plurality opinion) (opinion for four Justices treating Justice Harlan's *Poe* dissent as a central explication of the methodology of judicial review under the Due Process Clause).

Thus, a Connecticut court approved a statute legitimating a class of previous illegitimate marriages, as falling within the terms of the "social compact," while making clear its power to review constitutionality in those terms. *Goshen* v. *Stonington,* 4 Conn. 209, 225–226 (1822). In the same period, a specialized court of equity, created under a Tennessee statute solely to hear cases brought by the state bank against its debtors, found its own authorization unconstitutional as "partial" legislation violating the State Constitution's "law of the land" clause. *Bank of the State* v. *Cooper,* 2 Yerg. 599, 602–608 (Tenn. 1831) (opinion of Green, J.); *id.,* at 613–615 (opinion of Peck, J.); *id.,* at 618–623 (opinion of Kennedy, J.). And the middle of the 19th century brought the famous *Wynehamer* case, invalidating a statute purporting to render possession of liquor immediately illegal except when kept for narrow, specified purposes, the state court finding the statute inconsistent with the State's due process clause. *Wynehamer* v. *People,* 13 N. Y. 378, 486–487 (1856). The statute was deemed an excessive threat to the "fundamental rights of the citizen" to property. *Id.,* at 398 (opinion of Comstock, J.). See generally E. Corwin, Liberty Against Government 58–115 (1948) (discussing substantive due process in the state courts before the Civil War); T. Cooley, Constitutional Limitations *85–*129, *351–*397.

Even in this early period, however, this Court anticipated the developments that would presage both the Civil War and the ratification of the Fourteenth Amendment, by making it clear on several occasions that it too had no doubt of the judiciary's power to strike down legislation that conflicted with important but unenumerated principles of American government. In most such instances, after declaring its power to invalidate what it might find inconsistent with rights of liberty and property, the Court nevertheless went on to uphold the legislative Acts under review. See, *e. g., Wilkinson* v. *Leland,* 2 Pet. 627, 656–661 (1829); *Calder* v. *Bull,* 3 Dall. 386, 386–395 (1798) (opinion of Chase, J.); see also *Corfield* v. *Coryell,* 6 F. Cas. 546, 550–552 (No. 3,230) (CC ED Pa. 1823). But in *Fletcher* v. *Peck,* 6 Cranch 87 (1810), the Court went further. It struck down an Act of the Georgia Legislature that purported to rescind a sale of public land *ab initio* and reclaim title for the State, and so deprive subsequent, good-faith purchasers of property conveyed by the original grantees. The Court rested the invalidation on alternative sources of authority: the specific prohibitions against bills of attainder, *ex post facto* laws, laws impairing contracts in Article I, § 10, of the Constitution; and "general principles which are common to our free institutions," by which Chief Justice Marshall meant that a simple deprivation of property by the State could not be an authentically "legislative" Act. *Fletcher, supra,* at 135–139.

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[5] Coke indicates that prohibitions against deprivations without "due process of law" originated in an English statute that "rendred" Magna Carta's "law of the land" in such terms. See 2 E. Coke, Institutes 50 (1797); see also E. Corwin, Liberty Against Government 90–91 (1948).

Fletcher was not, though, the most telling early example of such review. For its most salient instance in this Court before the adoption of the Fourteenth Amendment was, of course, the case that the Amendment would in due course overturn, *Dred Scott* v. *Sandford,* 19 How. 393 (1857). Unlike *Fletcher, Dred Scott* was textually based on a Due Process Clause (in the Fifth Amendment, applicable to the National Government), and it was in reliance on that Clause's protection of property that the Court invalidated the Missouri Compromise. 19 How., at 449–452. This substantive protection of an owner's property in a slave taken to the territories was traced to the absence of any enumerated power to affect that property granted to the Congress by Article I of the Constitution, *id.*, at 451–452, the implication being that the Government had no legitimate interest that could support the earlier congressional compromise. The ensuing judgment of history needs no recounting here.

After the ratification of the Fourteenth Amendment, with its guarantee of due process protection against the States, interpretation of the words "liberty" and "property" as used in Due Process Clauses became a sustained enterprise, with the Court generally describing the due process criterion in converse terms of reasonableness or arbitrariness. That standard is fairly traceable to Justice Bradley's dissent in the *Slaughter-House Cases,* 16 Wall. 36 (1873), in which he said that a person's right to choose a calling was an element of liberty (as the calling, once chosen, was an aspect of property) and declared that the liberty and property protected by due process are not truly recognized if such rights may be "arbitrarily assailed," *id.,* at 116.[6] After that, opinions comparable to those that preceded *Dred Scott* expressed willingness to review legislative action for consistency with the Due Process Clause even as they upheld the laws in question. See, *e. g., Bartemeyer* v. *Iowa,* 18 Wall. 129, 133–135 (1874); *Munn* v. *Illinois,* 94 U. S. 113, 123–135 (1877); *Railroad Comm'n Cases,* 116 U. S. 307, 331 (1886); *Mugler* v.

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[6] The *Slaughter-House Cases* are important, of course, for their holding that the Privileges and Immunities Clause was no source of any but a specific handful of substantive rights. 16 Wall., at 74–80. To a degree, then, that decision may have led the Court to look to the Due Process Clause as a source of substantive rights. In *Twining* v. *New Jersey,* 211 U. S. 78, 95–97 (1908), for example, the Court of the *Lochner* Era acknowledged the strength of the case against *Slaughter-House*'s interpretation of the Privileges or Immunities Clause but reaffirmed that interpretation without questioning its own frequent reliance on the Due Process Clause as authorization for substantive judicial review. See also J. Ely, Democracy and Distrust 14–30 (1980) (arguing that the Privileges and Immunities Clause and not the Due Process Clause is the proper warrant for courts' substantive oversight of state legislation). But the courts' use of Due Process Clauses for that purpose antedated the 1873 decision, as we have seen, and would in time be supported in the *Poe* dissent, as we shall see.

Kansas, 123 U. S. 623, 659–670 (1887). See generally Corwin, *supra,* at 121–136 (surveying the Court's early Fourteenth Amendment cases and finding little dissent from the general principle that the Due Process Clause authorized judicial review of substantive statutes).

The theory became serious, however, beginning with *Allgeyer* v. *Louisiana,* 165 U. S. 578 (1897), where the Court invalidated a Louisiana statute for excessive interference with Fourteenth Amendment liberty to contract, *id.,* at 588–593, and offered a substantive interpretation of "liberty," that in the aftermath of the so-called *Lochner* Era has been scaled back in some respects, but expanded in others, and never repudiated in principle. The Court said that Fourteenth Amendment liberty includes "the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." *Id.,* at 589. "[W]e do not intend to hold that in no such case can the State exercise its police power," the Court added, but "[w]hen and how far such power may be legitimately exercised with regard to these subjects must be left for determination to each case as it arises." *Id.,* at 590.

Although this principle was unobjectionable, what followed for a season was, in the realm of economic legislation, the echo of *Dred Scott. Allgeyer* was succeeded within a decade by *Lochner* v. *New York,* 198 U. S. 45 (1905), and the era to which that case gave its name, famous now for striking down as arbitrary various sorts of economic regulations that post-New Deal courts have uniformly thought constitutionally sound. Compare, *e. g., id.,* at 62 (finding New York's maximum-hours law for bakers "unreasonable and entirely arbitrary"), and *Adkins* v. *Children's Hospital of D. C.,* 261

U. S. 525, 559 (1923) (holding a minimum-wage law "so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States"), with *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, 391 (1937) (overruling *Adkins* and approving a minimum-wage law on the principle that "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process"). As the parentheticals here suggest, while the cases in the *Lochner* line routinely invoked a correct standard of constitutional arbitrariness review, they harbored the spirit of *Dred Scott* in their absolutist implementation of the standard they espoused.

Even before the deviant economic due process cases had been repudiated, however, the more durable precursors of modern substantive due process were reaffirming this Court's obligation to conduct arbitrariness review, beginning with *Meyer* v. *Nebraska,* 262 U. S. 390 (1923). Without referring to any specific guarantee of the Bill of Rights, the Court invoked precedents from the *Slaughter-House Cases* through *Adkins* to declare that the Fourteenth Amendment protected "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." 262 U. S., at 399. The Court then held that the same Fourteenth Amendment liberty included a teacher's right to teach and the rights of parents to direct their children's education without unreasonable interference by the States, *id.,* at 400, with the result that Nebraska's prohibition on the teaching of foreign languages in the lower grades was "arbitrary and without reasonable relation to any end within the competency of the State," *id.,* at 403. See also *Pierce* v. *Society of Sisters,* 268 U. S. 510, 534–536 (1925) (finding that a statute that all but outlawed private schools lacked any "reasonable relation to some purpose within the competency of the State"); *Palko* v. *Connecticut,* 302 U. S. 319, 327–328 (1937) ("[E]ven in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary, may be overridden by the courts." "Is that [injury] to which the statute has subjected [the appellant] a hardship so acute and shocking that our polity will not endure it? Does it violate those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?" (citation and internal quotation marks omitted)).

After *Meyer* and *Pierce,* two further opinions took the major steps that lead to the modern law. The first was not even in a due process case but one about equal protection, *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U. S. 535 (1942), where the Court emphasized the "fundamental" nature of individual choice about procreation and so foreshadowed not only the later prominence of procreation as a subject of liberty protection, but the corresponding standard of "strict scrutiny," in this Court's Fourteenth Amendment law. See *id.*, at 541. *Skinner,* that is, added decisions regarding procreation to the list of liberties recognized in *Meyer* and *Pierce* and loosely suggested, as a gloss on their standard of arbitrariness, a judicial obligation to scrutinize any impingement on such an important interest with heightened care. In so doing, it suggested a point that Justice Harlan would develop, that the kind and degree of justification that a sensitive judge would demand of a State would depend on the importance of the interest being asserted by the individual. *Poe,* 367 U. S., at 543.

The second major opinion leading to the modern doctrine was Justice Harlan's *Poe* dissent just cited, the conclusion of which was adopted in *Griswold* v. *Connecticut,* 381 U. S. 479 (1965), and the authority of which was acknowledged in *Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U. S. 833 (1992). See also n. 4, *supra.* The dissent is important for three things that point to our responsibilities today. The first is Justice Harlan's respect for the tradition of substantive due process review itself, and his acknowledgment of the Judiciary's obligation to carry it on. For two centuries American courts, and for much of that time this Court, have thought it necessary to provide some degree of review over the substantive content of legislation under constitutional standards of textual breadth. The obligation was understood before *Dred Scott* and has continued after the repudiation of *Lochner*'s progeny, most notably on the subjects of segregation in public education, *Bolling* v. *Sharpe*, 347 U. S. 497, 500 (1954), interracial marriage, *Loving* v. *Virginia*, 388 U. S. 1, 12 (1967), marital privacy and contraception, *Carey* v. *Population Services Int'l*, 431 U. S. 678, 684–691 (1977); *Griswold* v. *Connecticut*, *supra*, at 481–486, abortion, *Planned Parenthood of Southeastern Pa.* v. *Casey*, *supra*, at 849, 869–879 (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.); *Roe* v. *Wade*, 410 U. S. 113, 152–166 (1973), personal control of medical treatment, *Cruzan* v. *Director, Mo. Dept. of Health*, 497 U. S. 261, 287–289 (1990) (O'CONNOR, J., concurring); *id.*, at 302 (Brennan, J., dissenting); *id.*, at 331 (STEVENS, J., dissenting); see also *id.*, at 278 (majority opinion), and physical confinement, *Foucha* v. *Louisiana*, 504 U. S. 71, 80–83 (1992). This enduring tradition of American constitutional practice is, in Justice Harlan's view, nothing more than what is required by the judicial authority and obligation to construe constitutional text and review legislation for conformity to that text. See *Marbury* v. *Madison*, 1 Cranch 137 (1803). Like many judges who preceded him and many who followed, he found it impossible to construe the text of due process without recognizing substantive, and not merely procedural, limitations. "Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three." *Poe, supra,* at 541.[7] The text of the Due Process Clause thus imposes nothing less than an obligation to give substantive content to the words "liberty" and "due process of law."

Following the first point of the *Poe* dissent, on the necessity to engage in the sort of examination we conduct today, the dissent's second and third implicitly address those cases, already noted, that are now condemned with virtual unanimity as disastrous mistakes of substantive due process review. The second of the dissent's lessons is a reminder that the business of such review is not the identification of extratextual absolutes but scrutiny of a legislative resolution (perhaps unconscious) of clashing principles, each quite possibly worthy in and of itself, but each to be weighed within the history of our values as a people. It is a comparison of the relative strengths of opposing claims that informs the judicial task, not a deduction from some first premise. Thus informed, judicial review still has no warrant to substitute one reasonable resolution of the contending positions for another, but authority to supplant the balance already struck between the contenders only when it falls outside the realm of the reasonable. Part III, below, deals with this second point, and also with the dissent's third, which takes the form of an object lesson in the explicit attention to detail that is no less essential to the intellectual discipline of substantive due process review than an understanding of the basic need to account for the two sides in the controversy and to respect legislation within the zone of reasonableness.

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[7] Judge Johnson of the New York Court of Appeals had made the point more obliquely a century earlier when he wrote that "the form of this declaration of right, 'no person shall be deprived of life, liberty or property, without due process of law,' necessarily imports that the legislature cannot make the mere existence of the rights secured the occasion of depriving a person of any of them, even by the forms which belong to 'due process of law.' For if it does not necessarily import this, then the legislative power is absolute." And, "[t]o provide for a trial to ascertain whether a man is in the enjoyment of [any] of these rights, and then, as a consequence of finding that he is in the enjoyment of it, to deprive him of it, is doing indirectly just what is forbidden to be done directly, and reduces the constitutional provision to a nullity." *Wynehamer* v. *People,* 13 N. Y. 378, 420 (1856).

III

My understanding of unenumerated rights in the wake of the *Poe* dissent and subsequent cases avoids the absolutist failing of many older cases without embracing the opposite pole of equating reasonableness with past practice described at a very specific level. See *Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U. S., at 847–849. That understanding begins with a concept of "ordered liberty," *Poe,* 367 U. S., at 549 (Harlan, J.); see also *Griswold,* 381 U. S., at 500, comprising a continuum of rights to be free from "arbitrary impositions and purposeless restraints," *Poe,* 367 U. S., at 543 (Harlan, J., dissenting).

> "Due Process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could

> serve as a substitute, in this area, for judgment and restraint." *Id.*, at 542.

See also *Moore* v. *East Cleveland*, 431 U. S. 494, 503 (1977) (plurality opinion of Powell, J.) ("Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society' ") (quoting *Griswold, supra*, at 501 (Harlan, J., concurring)).

After the *Poe* dissent, as before it, this enforceable concept of liberty would bar statutory impositions even at relatively trivial levels when governmental restraints are undeniably irrational as unsupported by any imaginable rationale. See, *e. g.*, *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 (1938) (economic legislation "not . . . unconstitutional unless . . . facts . . . preclude the assumption that it rests upon some rational basis"); see also *Poe, supra*, at 545, 548 (Harlan, J., dissenting) (referring to usual "presumption of constitutionality" and ordinary test "going merely to the plausibility of [a statute's] underlying rationale"). Such instances are suitably rare. The claims of arbitrariness that mark almost all instances of unenumerated substantive rights are those resting on "certain interests requir[ing] particularly careful scrutiny of the state needs asserted to justify their abridgment[,] [c]f. *Skinner* v. *Oklahoma* [*ex rel. Williamson*, 316 U. S. 535 (1942)]; *Bolling* v. *Sharpe*, [347 U. S. 497 (1954)]," *id.*, at 543; that is, interests in liberty sufficiently important to be judged "fundamental," *id.*, at 548; see also *id.*, at 541 (citing *Corfield* v. *Coryell*, 4 Wash. C. C. 371, 380 (CC ED Pa. 1825)). In the face of an interest this powerful a State may not rest on threshold rationality or a presumption of constitutionality, but may prevail only on the ground of an interest sufficiently compelling to place within the realm of the reasonable a refusal to recognize the individual right asserted. *Poe, supra*, at 548 (Harlan, J., dissenting) (an "enactment involv[ing] . . . a most fundamental aspect of 'liberty' . . . [is] subjec[t] to 'strict scrutiny' ") (quoting *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U. S., at 541);[8] *Reno* v. *Flores,* 507 U. S. 292, 301–302 (1993) (reaffirming that due process "forbids the government to infringe certain 'fundamental' liberty interests . . . unless the infringement is narrowly tailored to serve a compelling state interest").[9]

This approach calls for a court to assess the relative "weights" or dignities of the contending interests, and to this extent the judicial method is familiar to the common law. Common-law method is subject, however, to two important constraints in the hands of a court engaged in substantive due process review. First, such a court is bound to confine the values that it recognizes to those truly deserving constitutional stature, either to those expressed in constitutional text, or those exemplified by "the traditions from which [the Nation] developed," or revealed by contrast with "the traditions from which it broke." *Poe,* 367 U. S., at 542 (Harlan, J., dissenting). " 'We may not draw on our merely personal and private notions and disregard the limits . . . derived from considerations that are fused in the whole nature of our judicial process . . . [,] considerations deeply rooted in reason and in the compelling traditions of the legal profession.'" *Id.*, at 544–545 (quoting *Rochin* v. *California*, 342 U. S. 165, 170–171 (1952)); see also *Palko* v. *Connecticut*, 302 U. S., at 325 (looking to "'principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental'") (quoting *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934)).

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[8] We have made it plain, of course, that not every law that incidentally makes it somewhat harder to exercise a fundamental liberty must be justified by a compelling counterinterest. See *Casey,* 505 U. S., at 872–876 (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.); *Carey* v. *Population Services Int'l,* 431 U. S. 678, 685–686 (1977) ("[A]n individual's [constitutionally protected] liberty to make choices regarding contraception does not . . . automatically invalidate every state regulation in this area. The business of manufacturing and selling contraceptives may be regulated in ways that do not [even] infringe protected individual choices"). But a state law that creates a "substantial obstacle," *Casey, supra,* at 877, for the exercise of a fundamental liberty interest requires a commensurably substantial justification in order to place the legislation within the realm of the reasonable.

[9] Justice Harlan thus recognized just what the Court today assumes, that by insisting on a threshold requirement that the interest (or, as the Court puts it, the right) be fundamental before anything more than rational basis justification is required, the Court ensures that not every case will require the "complex balancing" that heightened scrutiny entails. See *ante,* at 722.

The second constraint, again, simply reflects the fact that constitutional review, not judicial lawmaking, is a court's business here. The weighing or valuing of contending interests in this sphere is only the first step, forming the basis for determining whether the statute in question falls inside or outside the zone of what is reasonable in the way it resolves the conflict between the interests of state and individual. See, *e. g.*, *Poe*, *supra*, at 553 (Harlan, J., dissenting); *Youngberg* v. *Romeo*, 457 U. S. 307, 320–321 (1982). It is no justification for judicial intervention merely to identify a reasonable resolution of contending values that differs from the terms of the legislation under review. It is only when the legislation's justifying principle, critically valued, is so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied that the statute must give way. Only if this standard points against the statute can the individual claimant be said to have a constitutional right. See *Cruzan* v. *Director, Mo. Dept. of Health*, 497 U. S., at 279 ("[D]etermining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; 'whether [the individual's] constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests'") (quoting *Youngberg* v. *Romeo*, *supra*, at 321).[10]

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[10] Our cases have used various terms to refer to fundamental liberty interests, see, *e. g.*, *Poe*, 367 U. S., at 545 (Harlan, J., dissenting) ("'basic liberty'") (quoting *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535,

The *Poe* dissent thus reminds us of the nature of review for reasonableness or arbitrariness and the limitations entailed by it. But the opinion cautions against the repetition of past error in another way as well, more by its example than by any particular statement of constitutional method: it reminds us that the process of substantive review by reasoned judgment, *Poe*, 367 U. S., at 542–544, is one of close criticism going to the details of the opposing interests and to their relationships with the historically recognized principles that lend them weight or value.

Although the *Poe* dissent disclaims the possibility of any general formula for due process analysis (beyond the basic analytic structure just described), see *id.*, at 542, 544, Justice Harlan of course assumed that adjudication under the Due Process Clauses is like any other instance of judgment dependent on common-law method, being more or less persuasive according to the usual canons of critical discourse. See also *Casey*, 505 U. S., at 849 ("The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment"). When identifying and assessing the competing interests of liberty and authority, for ex-

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541 (1942)); *Poe, supra*, at 543 (Harlan, J., dissenting) ("certain interests" must bring "particularly careful scrutiny"); *Casey*, 505 U. S., at 851 ("protected liberty"); *Cruzan* v. *Director, Mo. Dept. of Health*, 497 U. S. 261, 278 (1990) ("constitutionally protected liberty interest"); *Youngberg* v. *Romeo*, 457 U. S., at 315 ("liberty interests"), and at times we have also called such an interest a "right" even before balancing it against the government's interest, see, *e. g., Roe* v. *Wade*, 410 U. S. 113, 153–154 (1973); *Carey* v. *Population Services Int'l, supra*, at 686, 688, and n. 5; *Poe, supra*, at 541 ("rights 'which are . . . *fundamental*' ") (quoting *Corfield* v. *Coryell*, 4 Wash. C. C. 371, 380 (CC ED Pa. 1825)). Precision in terminology, however, favors reserving the label "right" for instances in which the individual's liberty interest actually trumps the government's countervailing interests; only then does the individual have anything legally enforceable as against the State's attempt at regulation.

ample, the breadth of expression that a litigant or a judge selects in stating the competing principles will have much to do with the outcome and may be dispositive. As in any process of rational argumentation, we recognize that when a generally accepted principle is challenged, the broader the attack the less likely it is to succeed. The principle's defenders will, indeed, often try to characterize any challenge as just such a broadside, perhaps by couching the defense as if a broadside attack had occurred. So the Court in *Dred Scott* treated prohibition of slavery in the Territories as nothing less than a general assault on the concept of property. See 19 How., at 449–452.

Just as results in substantive due process cases are tied to the selections of statements of the competing interests, the acceptability of the results is a function of the good reasons for the selections made. It is here that the value of common-law method becomes apparent, for the usual thinking of the common law is suspicious of the all-or-nothing analysis that tends to produce legal petrification instead of an evolving boundary between the domains of old principles. Common-law method tends to pay respect instead to detail, seeking to understand old principles afresh by new examples and new counterexamples. The "tradition is a living thing," *Poe,* 367 U. S., at 542 (Harlan, J., dissenting), albeit one that moves by moderate steps carefully taken. "The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take its place in relation to what went before and further [cut] a channel for what is to come." *Id.,* at 544 (Harlan, J., dissenting) (internal quotation marks omitted). Exact analysis and characterization of any due process claim are critical to the method and to the result.

So, in *Poe,* Justice Harlan viewed it as essential to the plaintiffs' claimed right to use contraceptives that they sought to do so within the privacy of the marital bedroom. This detail in fact served two crucial and complementary functions, and provides a lesson for today. It rescued the individuals' claim from a breadth that would have threatened all state regulation of contraception or intimate relations; extramarital intimacy, no matter how privately practiced, was outside the scope of the right Justice Harlan would have recognized in that case. See *id.*, at 552–553. It was, moreover, this same restriction that allowed the interest to be valued as an aspect of a broader liberty to be free from all unreasonable intrusions into the privacy of the home and the family life within it, a liberty exemplified in constitutional provisions such as the Third and Fourth Amendments, in prior decisions of the Court involving unreasonable intrusions into the home and family life, and in the then-prevailing status of marriage as the sole lawful locus of intimate relations. *Id.*, at 548, 551.[11] The individuals' interest was therefore at its peak in *Poe,* because it was supported by a principle that distinguished of its own force between areas in which government traditionally had regulated (sexual relations outside of marriage) and those in which it had not (private marital intimacies), and thus was broad enough to cover the claim at hand without being so broad as to be shot-through by exceptions.

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[11] Thus, as the *Poe* dissent illustrates, the task of determining whether the concrete right claimed by an individual in a particular case falls within the ambit of a more generalized protected liberty requires explicit analysis when what the individual wants to do could arguably be characterized as belonging to different strands of our legal tradition requiring different degrees of constitutional scrutiny. See also Tribe & Dorf, Levels of Generality in the Definition of Rights, 57 U. Chi. L. Rev. 1057, 1091 (1990) (abortion might conceivably be assimilated either to the tradition regarding women's reproductive freedom in general, which places a substantial burden of justification on the State, or to the tradition regarding protection of fetuses, as embodied in laws criminalizing feticide by someone other than the mother, which generally requires only rationality on the part of the State). Selecting among such competing characterizations demands reasoned judgment about which broader principle, as exemplified in the concrete privileges and prohibitions embodied in our legal tradition, best fits the particular claim asserted in a particular case.

On the other side of the balance, the State's interest in *Poe* was not fairly characterized simply as preserving sexual morality, or doing so by regulating contraceptive devices. Just as some of the earlier cases went astray by speaking without nuance of individual interests in property or autonomy to contract for labor, so the State's asserted interest in *Poe* was not immune to distinctions turning (at least potentially) on the precise purpose being pursued and the collateral consequences of the means chosen, see *id.*, at 547–548. It was assumed that the State might legitimately enforce limits on the use of contraceptives through laws regulating divorce and annulment, or even through its tax policy, *ibid.*, but not necessarily be justified in criminalizing the same practice in the marital bedroom, which would entail the consequence of authorizing state enquiry into the intimate relations of a married couple who chose to close their door, *id.*, at 548–549. See also *Casey*, 505 U. S., at 869 (strength of State's interest in potential life varies depending on precise context and character of regulation pursuing that interest).

The same insistence on exactitude lies behind questions, in current terminology, about the proper level of generality at which to analyze claims and counterclaims, and the demand for fitness and proper tailoring of a restrictive statute is just another way of testing the legitimacy of the generality at which the government sets up its justification.[12] We may therefore classify Justice Harlan's example of proper analysis in any of these ways: as applying concepts of normal critical reasoning, as pointing to the need to attend to the levels of generality at which countervailing interests are stated, or as examining the concrete application of principles for fitness with their own ostensible justifications. But whatever the categories in which we place the dissent's example, it stands in marked contrast to earlier cases whose reasoning was marked by comparatively less discrimination, and it points to the importance of evaluating the claims of the parties now before us with comparable detail. For here we are faced with an individual claim not to a right on the part of just anyone to help anyone else commit suicide under any circumstances, but to the right of a narrow class to help others also in a narrow class under a set of limited circumstances. And the claimants are met with the State's assertion, among others, that rights of such narrow scope cannot be recognized without jeopardy to individuals whom the State may concededly protect through its regulations.

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[12] The dual dimensions of the strength and the fitness of the government's interest are succinctly captured in the so-called "compelling interest test," under which regulations that substantially burden a constitutionally protected (or "fundamental") liberty may be sustained only if "narrowly tailored to serve a compelling state interest," *Reno* v. *Flores*, 507 U. S. 292, 302 (1993); see also, *e. g., Roe* v. *Wade*, 410 U. S., at 155; *Carey* v. *Population Services Int'l*, 431 U. S., at 686. How compelling the interest and how narrow the tailoring must be will depend, of course, not only on the substantiality of the individual's own liberty interest, but also on the extent of the burden placed upon it, see *Casey*, 505 U. S., at 871–874 (opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.); *Carey, supra,* at 686.

IV

A

Respondents claim that a patient facing imminent death, who anticipates physical suffering and indignity, and is capable of responsible and voluntary choice, should have a right to a physician's assistance in providing counsel and drugs to be administered by the patient to end life promptly. Complaint ¶ 3.1. They accordingly claim that a physician must have the corresponding right to provide such aid, contrary to the provisions of Wash. Rev. Code § 9A.36.060 (1994). I do not understand the argument to rest on any assumption that rights either to suicide or to assistance in committing it are historically based as such. Respondents, rather, acknowledge the prohibition of each historically, but rely on the fact that to a substantial extent the State has repudiated that history. The result of this, respondents say, is to open the door to claims of such a patient to be accorded one of the options open to those with different, traditionally cognizable claims to autonomy in deciding how their bodies and minds should be treated. They seek the option to obtain the services of a physician to give them the benefit of advice and medical help, which is said to enjoy a tradition so strong and so devoid of specifically countervailing state concern that denial of a physician's help in these circumstances is arbitrary when physicians are generally free to advise and aid those who exercise other rights to bodily autonomy.

1

The dominant western legal codes long condemned suicide and treated either its attempt or successful accomplishment as a crime, the one subjecting the individual to penalties, the other penalizing his survivors by designating the suicide's property as forfeited to the government. See 4 W. Blackstone, Commentaries *188–*189 (commenting that English law considered suicide to be "ranked . . . among the highest crimes" and deemed persuading another to commit suicide to be murder); see generally Marzen, O'Dowd, Crone, & Balch, Suicide: A Constitutional Right?, 24 Duquesne L. Rev. 1, 56–63 (1985). While suicide itself has generally not been considered a punishable crime in the United States, largely because the common-law punishment of forfeiture was rejected as improperly penalizing an innocent family, see *id.*, at 98–99, most States have consistently punished the act of assisting a suicide as either a common-law or statutory crime and some continue to view suicide as an unpunishable crime. See generally *id.*, at 67–100, 148–242.[13] Criminal prohibitions on such assistance remain widespread, as exemplified in the Washington statute in question here.[14]

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[13] Washington and New York are among the minority of States to have criminalized attempted suicide, though neither State still does so. See Brief for Members of the New York and Washington State Legislatures as *Amicus Curiae* 15, n. 8 (listing state statutes). The common law governed New York as a Colony and the New York Constitution of 1777 recognized the common law, N. Y. Const. of 1777, Art. XXXV, and the state legislature recognized common-law crimes by statute in 1788. See Act of

The principal significance of this history in the State of Washington, according to respondents, lies in its repudiation

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Feb. 21, 1788, ch. 37, § 2, 1788 N. Y. Laws 664 (codified at 2 N. Y. Laws 73 (Greenleaf 1792)). In 1828, New York changed the common-law offense of assisting suicide from murder to manslaughter in the first degree. See 2 N. Y. Rev. Stat. pt. 4, ch. 1, tit. 2, art. 1, § 7, p. 661 (1829). In 1881, New York adopted a new penal code making attempted suicide a crime punishable by two years in prison, a fine, or both, and retaining the criminal prohibition against assisting suicide as manslaughter in the first degree. Act of July 26, 1881, ch. 676, §§ 172–178, 1881 N. Y. Laws (3 Penal Code), pp. 42–43 (codified at 4 N. Y. Consolidated Laws, Penal Law §§ 2300–2306, pp. 2809–2810 (1909)). In 1919, New York repealed the statutory provision making attempted suicide a crime. See Act of May 5, 1919, ch. 414, § 1, 1919 N. Y. Laws 1193. The 1937 New York Report of the Law Revision Commission found that the history of the ban on assisting suicide was "traceable into the ancient common law when a suicide or *felo de se* was guilty of crime punishable by forfeiture of his goods and chattels." State of New York, Report of the Law Revision Commission for 1937, p. 830. The report stated that since New York had removed "all stigma [of suicide] as a crime" and that "[s]ince liability as an accessory could no longer hinge upon the crime of a principal, it was necessary to define it as a substantive offense." *Id.*, at 831. In 1965, New York revised its penal law, providing that a "person is guilty of manslaughter in the second degree when . . . he intentionally causes or aids another person to commit suicide." Penal Law, ch. 1030, 1965 N. Y. Laws 2387 (codified at N. Y. Penal Law § 125.15(3) (McKinney 1975)).

Washington's first territorial legislature designated assisting another "in the commission of self-murder" to be manslaughter, see Act of Apr. 28, 1854, § 17, 1854 Wash. Laws 78, and reenacted the provision in 1869 and 1873, see Act of Dec. 2, 1869, § 17, 1869 Wash. Laws 201; Act of Nov. 10, 1873, § 19, 1873 Wash. Laws 184 (codified at Wash. Code § 794 (1881)). In 1909, the state legislature enacted a law based on the 1881 New York law and a similar one enacted in Minnesota, see Marzen, O'Dowd, Crone, & Balch, 24 Duquesne L. Rev., at 206, making attempted suicide a crime punishable by two years in prison or a fine, and retaining the criminal prohibition against assisting suicide, designating it manslaughter. See Criminal Code, ch. 249, §§ 133–137, 1909 Wash. Laws, 11th Sess., 890, 929 (codified at Remington & Ballinger's Wash. Code §§ 2385–2389

[Footnote 14 is on p. 776]

of the old tradition to the extent of eliminating the criminal suicide prohibitions. Respondents do not argue that the State's decision goes further, to imply that the State has repudiated any legitimate claim to discourage suicide or to limit its encouragement. The reasons for the decriminalization, after all, may have had more to do with difficulties of law enforcement than with a shift in the value ascribed to

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(1910)). In 1975, the Washington Legislature repealed these provisions, see Wash. Crim. Code, 1975, ch. 260, § 9A.92.010 (213–217), 1975 Wash. Laws 817, 858, 866, and enacted the ban on assisting suicide at issue in this case, see Wash. Crim. Code, 1975, ch. 260, § 9A.36.060, 1975 Wash. Laws 817, 836, codified at Rev. Wash. Code § 9A.36.060 (1977). The decriminalization of attempted suicide reflected the view that a person compelled to attempt it should not be punished if the attempt proved unsuccessful. See *Compassion in Dying* v. *Washington*, 850 F. Supp. 1454, 1464, n. 9 (WD Wash. 1994) (citing Legislative Council Judiciary Committee, Report on the Revised Washington Criminal Code 153 (Dec. 3, 1970).

[14] Numerous States have enacted statutes prohibiting assisting a suicide. See, *e. g.*, Alaska Stat. Ann. § 11.41.120(a)(2) (1996); Ariz. Rev. Stat. Ann. § 13–1103(A)(3) (Supp. 1996–1997); Ark. Code Ann. § 5–10–104(a)(2) (1993); Cal. Penal Code Ann. § 401 (West 1988); Colo. Rev. Stat. § 18–3–104(1)(b) (Supp. 1996); Conn. Gen. Stat. § 53a–56(a)(2) (1997); Del. Code Ann., Tit. 11, § 645 (1995); Fla. Stat. § 782.08 (1991); Ga. Code Ann. § 16–5–5(b) (1996); Haw. Rev. Stat. § 707-702(1)(b) (1993); Ill. Comp. Stat., ch. 720, § 5/12–31 (1993); Ind. Code §§ 35–42–1–2 to 35–42–1–2.5 (1994 and Supp. 1996); Iowa Code Ann. § 707A.2 (West Supp. 1997); Kan. Stat. Ann. § 21–3406 (1995); Ky. Rev. Stat. Ann. § 216.302 (Michie 1994); La. Rev. Stat. Ann. § 14:32.12 (West Supp. 1997); Me. Rev. Stat. Ann., Tit. 17–A, § 204 (1983); Mich. Comp. Laws Ann. § 752.1027 (West Supp. 1997–1998); Minn. Stat. § 609.215 (1996); Miss. Code Ann. § 97–3–49 (1994); Mo. Rev. Stat. § 565.023.1(2) (1994); Mont. Code Ann. § 45–5–105 (1995); Neb. Rev. Stat. § 28–307 (1995); N. H. Rev. Stat. Ann. § 630:4 (1996); N. J. Stat. Ann. § 2C:11–6 (West 1995); N. M. Stat. Ann. § 30–2–4 (1996); N. Y. Penal Law § 120.30 (McKinney 1987); N. D. Cent. Code § 12.1–16–04 (Supp. 1995); Okla. Stat., Tit. 21, §§ 813–815 (1983); Ore. Rev. Stat. § 163.125(1)(b) (1991); Pa. Stat. Ann., Tit. 18, § 2505 (Purdon 1983); R. I. Gen. Laws §§ 11–60–1 through 11–60–5 (Supp. 1996); S. D. Codified Laws § 22–16–37 (1988); Tenn. Code Ann. § 39–13–216 (Supp. 1996); Tex. Penal Code Ann. § 22.08 (1994); Wash. Rev. Code § 9A.36.060 (1994); Wis. Stat. § 940.12 (1993–1994). See also P. R. Laws Ann., Tit. 33, § 4009 (1984).

life in various circumstances or in the perceived legitimacy of taking one's own. See, *e. g.*, Kamisar, Physician-Assisted Suicide: The Last Bridge to Active Voluntary Euthanasia, in Euthanasia Examined 225, 229 (J. Keown ed. 1995); CeloCruz, Aid-in-Dying: Should We Decriminalize Physician-Assisted Suicide and Physician-Committed Euthanasia?, 18 Am. J. L. & Med. 369, 375 (1992); Marzen, O'Dowd, Crone, & Balch, 24 Duquesne L. Rev., at 98–99. Thus it may indeed make sense for the State to take its hands off suicide as such, while continuing to prohibit the sort of assistance that would make its commission easier. See, *e. g.*, American Law Institute, Model Penal Code § 210.5, Comment 5 (1980). Decriminalization does not, then, imply the existence of a constitutional liberty interest in suicide as such; it simply opens the door to the assertion of a cognizable liberty interest in bodily integrity and associated medical care that would otherwise have been inapposite so long as suicide, as well as assisting a suicide, was a criminal offense.

This liberty interest in bodily integrity was phrased in a general way by then-Judge Cardozo when he said, "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body" in relation to his medical needs. *Schloendorff* v. *Society of New York Hospital*, 211 N. Y. 125, 129, 105 N. E. 92, 93 (1914). The familiar examples of this right derive from the common law of battery and include the right to be free from medical invasions into the body, *Cruzan* v. *Director, Mo. Dept. of Health*, 497 U. S., at 269–279, as well as a right generally to resist enforced medication, see *Washington* v. *Harper*, 494 U. S. 210, 221–222, 229 (1990). Thus "[i]t is settled now . . . that the Constitution places limits on a State's right to interfere with a person's most basic decisions about . . . bodily integrity." *Casey*, 505 U. S., at 849 (citations omitted); see also *Cruzan*, 497 U. S., at 278; *id.*, at 288 (O'CONNOR, J., concurring); *Washington* v. *Harper*, *supra*, at 221–222; *Winston* v. *Lee*, 470 U. S. 753, 761–762 (1985); *Rochin* v. *California*, 342

U. S., at 172. Constitutional recognition of the right to bodily integrity underlies the assumed right, good against the State, to require physicians to terminate artificial life support, *Cruzan*, *supra*, at 279 ("[W]e assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition"), and the affirmative right to obtain medical intervention to cause abortion, see *Casey*, *supra*, at 857, 896; cf. *Roe* v. *Wade*, 410 U. S., at 153.

It is, indeed, in the abortion cases that the most telling recognitions of the importance of bodily integrity and the concomitant tradition of medical assistance have occurred. In *Roe* v. *Wade*, the plaintiff contended that the Texas statute making it criminal for any person to "procure an abortion," *id.*, at 117, for a pregnant woman was unconstitutional insofar as it prevented her from "terminat[ing] her pregnancy by an abortion 'performed by a competent, licensed physician, under safe, clinical conditions,'" *id.*, at 120, and in striking down the statute we stressed the importance of the relationship between patient and physician, see *id.*, at 153, 156.

The analogies between the abortion cases and this one are several. Even though the State has a legitimate interest in discouraging abortion, see *Casey*, *supra*, at 871 (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.); *Roe*, 410 U. S., at 162, the Court recognized a woman's right to a physician's counsel and care. Like the decision to commit suicide, the decision to abort potential life can be made irresponsibly and under the influence of others, and yet the Court has held in the abortion cases that physicians are fit assistants. Without physician assistance in abortion, the woman's right would have too often amounted to nothing more than a right to self-mutilation, and without a physician to assist in the suicide of the dying, the patient's right will often be confined to crude methods of causing death, most shocking and painful to the decedent's survivors.

There is, finally, one more reason for claiming that a physician's assistance here would fall within the accepted tradition of medical care in our society, and the abortion cases are only the most obvious illustration of the further point. While the Court has held that the performance of abortion procedures can be restricted to physicians, the Court's opinion in *Roe* recognized the doctors' role in yet another way. For, in the course of holding that the decision to perform an abortion called for a physician's assistance, the Court recognized that the good physician is not just a mechanic of the human body whose services have no bearing on a person's moral choices, but one who does more than treat symptoms, one who ministers to the patient. See *id.*, at 153; see also *Griswold* v. *Connecticut*, 381 U. S., at 482 ("This law . . . operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation"); see generally R. Cabot, Ether Day Address, Boston Medical and Surgical J. 287, 288 (1920). This idea of the physician as serving the whole person is a source of the high value traditionally placed on the medical relationship. Its value is surely as apparent here as in the abortion cases, for just as the decision about abortion is not directed to correcting some pathology, so the decision in which a dying patient seeks help is not so limited. The patients here sought not only an end to pain (which they might have had, although perhaps at the price of stupor) but an end to their short remaining lives with a dignity that they believed would be denied them by powerful pain medication, as well as by their consciousness of dependency and helplessness as they approached death. In that period when the end is imminent, they said, the decision to end life is closest to decisions that are generally accepted as proper instances of exercising autonomy over one's own body, instances recognized under the Constitution and the State's own law, instances in which the help of physicians is accepted as falling within the traditional norm.

Respondents argue that the State has in fact already recognized enough evolving examples of this tradition of patient care to demonstrate the strength of their claim. Washington, like other States, authorizes physicians to withdraw life-sustaining medical treatment and artificially delivered food and water from patients who request it, even though such actions will hasten death. See Wash. Rev. Code §§ 70.122.110, 70.122.051 (1994); see generally Notes to Uniform Rights of the Terminally Ill Act, 9B U. L. A. 168–169 (Supp. 1997) (listing state statutes). The State permits physicians to alleviate anxiety and discomfort when withdrawing artificial life-supporting devices by administering medication that will hasten death even further. And it generally permits physicians to administer medication to patients in terminal conditions when the primary intent is to alleviate pain, even when the medication is so powerful as to hasten death and the patient chooses to receive it with that understanding. See Wash. Rev. Code § 70.122.010 (1994); see generally Rousseau, Terminal Sedation in the Care of Dying Patients, 156 Archives of Internal Medicine 1785 (1996); Truog, Berde, Mitchell, & Grier, Barbiturates in the Care of the Terminally Ill, 327 New Eng. J. Med. 1678 (1992).[15]

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[15] Other States have enacted similar provisions, some categorically authorizing such pain treatment, see, *e. g.*, Ind. Code § 35–42–1–2.5(a)(1) (Supp. 1996) (ban on assisted suicide does not apply to licensed health-care provider who administers or dispenses medications or procedures to relieve pain or discomfort, even if such medications or procedures hasten death, unless provider intends to cause death); Iowa Code Ann. § 707A.3.1 (West Supp. 1997) (same); Ky. Rev. Stat. Ann. § 216.304 (Michie 1997) (same); Minn. Stat. Ann. § 609.215(3) (West Supp. 1997) (same); Ohio Rev. Code Ann. §§ 2133.11(A)(6), 2133.12(E)(1) (1994); R. I. Gen. Laws § 11–60–4 (Supp. 1996) (same); S. D. Codified Laws § 22–16–37.1 (Supp. 1997); see Mich. Comp. Laws Ann. § 752.1027(3) (West Supp. 1997); Tenn. Code Ann. § 39–13–216(b)(2) (1996); others permit patients to sign health-care directives in which they authorize pain treatment even if it hastens death. See, *e. g.*, Me. Rev. Stat. Ann., Tit. 18–A, §§ 5–804, 5–809 (1996); N. M. Stat. Ann. §§ 24–7A–4, 24–7A–9 (Supp. 1995); S. C. Code Ann. § 62–5–504 (Supp. 1996); Va. Code Ann. §§ 54.1–2984, 4.1–2988 (1994).

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The argument supporting respondents' position thus progresses through three steps of increasing forcefulness. First, it emphasizes the decriminalization of suicide. Reliance on this fact is sanctioned under the standard that looks not only to the tradition retained, but to society's occasional choices to reject traditions of the legal past. See *Poe* v. *Ullman,* 367 U. S., at 542 (Harlan, J., dissenting). While the common law prohibited both suicide and aiding a suicide, with the prohibition on aiding largely justified by the primary prohibition on self-inflicted death itself, see, *e. g.*, American Law Institute, Model Penal Code § 210.5, Comment 1, at 92–93, and n. 7, the State's rejection of the traditional treatment of the one leaves the criminality of the other open to questioning that previously would not have been appropriate. The second step in the argument is to emphasize that the State's own act of decriminalization gives a freedom of choice much like the individual's option in recognized instances of bodily autonomy. One of these, abortion, is a legal right to choose in spite of the interest a State may legitimately invoke in discouraging the practice, just as suicide is now subject to choice, despite a state interest in discouraging it. The third step is to emphasize that respondents claim a right to assistance not on the basis of some broad principle that would be subject to exceptions if that continuing interest of the State's in discouraging suicide were to be recognized at all. Respondents base their claim on the traditional right to medical care and counsel, subject to the limiting conditions of informed, responsible choice when death is imminent, conditions that support a strong analogy to rights of care in other situations in which medical counsel and assistance have been available as a matter of course. There can be no stronger claim to a physician's assistance than at the time when death is imminent, a moral judgment implied by the State's own recognition of the legitimacy of medical procedures necessarily hastening the moment of impending death.

In my judgment, the importance of the individual interest here, as within that class of "certain interests" demanding careful scrutiny of the State's contrary claim, see *Poe, supra,* at 543, cannot be gainsaid. Whether that interest might in some circumstances, or at some time, be seen as "fundamental" to the degree entitled to prevail is not, however, a conclusion that I need draw here, for I am satisfied that the State's interests described in the following section are sufficiently serious to defeat the present claim that its law is arbitrary or purposeless.

B

The State has put forward several interests to justify the Washington law as applied to physicians treating terminally ill patients, even those competent to make responsible choices: protecting life generally, Brief for Petitioners 33, discouraging suicide even if knowing and voluntary, *id.,* at 37–38, and protecting terminally ill patients from involuntary suicide and euthanasia, both voluntary and nonvoluntary, *id.,* at 34–35.

It is not necessary to discuss the exact strengths of the first two claims of justification in the present circumstances, for the third is dispositive for me. That third justification is different from the first two, for it addresses specific features of respondents' claim, and it opposes that claim not with a moral judgment contrary to respondents', but with a recognized state interest in the protection of nonresponsible individuals and those who do not stand in relation either to death or to their physicians as do the patients whom respondents describe. The State claims interests in protecting patients from mistakenly and involuntarily deciding to end their lives, and in guarding against both voluntary and involuntary euthanasia. Leaving aside any difficulties in coming to a clear concept of imminent death, mistaken decisions may result from inadequate palliative care or a terminal prognosis that turns out to be error; coercion and abuse may stem from the large medical bills that family members cannot bear or unreimbursed hospitals decline to shoulder. Voluntary and involuntary euthanasia may result once doctors are authorized to prescribe lethal medication in the first instance, for they might find it pointless to distinguish between patients who administer their own fatal drugs and those who wish not to, and their compassion for those who suffer may obscure the distinction between those who ask for death and those who may be unable to request it. The argument is that a progression would occur, obscuring the line between the ill and the dying, and between the responsible and the unduly influenced, until ultimately doctors and perhaps others would abuse a limited freedom to aid suicides by yielding to the impulse to end another's suffering under conditions going beyond the narrow limits the respondents propose. The State thus argues, essentially, that respondents' claim is not as narrow as it sounds, simply because no recognition of the interest they assert could be limited to vindicating those interests and affecting no others. The State says that the claim, in practical effect, would entail consequences that the State could, without doubt, legitimately act to prevent.

The mere assertion that the terminally sick might be pressured into suicide decisions by close friends and family members would not alone be very telling. Of course that is possible, not only because the costs of care might be more than family members could bear but simply because they might naturally wish to see an end of suffering for someone they love. But one of the points of restricting any right of assistance to physicians would be to condition the right on an exercise of judgment by someone qualified to assess the patient's responsible capacity and detect the influence of those outside the medical relationship.

The State, however, goes further, to argue that dependence on the vigilance of physicians will not be enough. First, the lines proposed here (particularly the requirement of a knowing and voluntary decision by the patient) would be more difficult to draw than the lines that have limited other recently recognized due process rights. Limiting a State from prosecuting use of artificial contraceptives by married couples posed no practical threat to the State's capacity to regulate contraceptives in other ways that were assumed at the time of *Poe* to be legitimate; the trimester measurements of *Roe* and the viability determination of *Casey* were easy to make with a real degree of certainty. But the knowing and responsible mind is harder to assess.[16] Second, this difficulty could become the greater by combining with another fact within the realm of plausibility, that physicians simply would not be assiduous to preserve the line. They have compassion, and those who would be willing to assist in suicide at all might be the most susceptible to the wishes of a patient, whether the patient was technically quite responsible or not. Physicians, and their hospitals, have their own financial incentives, too, in this new age of managed care. Whether acting from compassion or under some other influence, a physician who would provide a drug for a patient to administer might well go the further step of administering the drug himself; so, the barrier between assisted suicide and euthanasia could become porous, and the line between voluntary and involuntary euthanasia as well.[17] The case for the slippery slope is fairly made out here, not because recognizing one due process right would leave a court with no principled basis to avoid recognizing another, but because there is a plausible case that the right claimed would not be readily containable by reference to facts about the mind that are matters of difficult judgment, or by gatekeepers who are subject to temptation, noble or not.

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[16] While it is also more difficult to assess in cases involving limitations on life incidental to pain medication and the disconnection of artificial life support, there are reasons to justify a lesser concern with the punctilio of responsibility in these instances. The purpose of requesting and giving the medication is presumably not to cause death but to relieve the pain so that the State's interest in preserving life is not unequivocally implicated by the practice; and the importance of pain relief is so clear that there is less likelihood that relieving pain would run counter to what a responsible patient would choose, even with the consequences for life expectancy. As for ending artificial life support, the State again may see its interest in preserving life as weaker here than in the general case just because artificial life support preserves life when nature would not; and, because such life support is a frequently offensive bodily intrusion, there is a lesser reason to fear that a decision to remove it would not be the choice of one fully responsible. Where, however, a physician writes a prescription to equip a patient to end life, the prescription is written to serve an affirmative intent to die (even though the physician need not and probably does not characteristically have an intent that the patient die but only that the patient be equipped to make the decision). The patient's responsibility and competence are therefore crucial when the physician is presented with the request.

Respondents propose an answer to all this, the answer of state regulation with teeth. Legislation proposed in several States, for example, would authorize physician-assisted suicide but require two qualified physicians to confirm the patient's diagnosis, prognosis, and competence; and would mandate that the patient make repeated requests witnessed by at least two others over a specified timespan; and would impose reporting requirements and criminal penalties for various acts of coercion. See App. to Brief for State Legislators as *Amici Curiae* 1a–2a.

But at least at this moment there are reasons for caution in predicting the effectiveness of the teeth proposed. Respondents' proposals, as it turns out, sound much like the guidelines now in place in the Netherlands, the only place where experience with physician-assisted suicide and euthanasia has yielded empirical evidence about how such regulations might affect actual practice. Dutch physicians must engage in consultation before proceeding, and must decide whether the patient's decision is voluntary, well considered, and stable, whether the request to die is enduring and made more than once, and whether the patient's future will involve unacceptable suffering. See C. Gomez, Regulating Death 40–43 (1991). There is, however, a substantial dispute today about what the Dutch experience shows. Some commentators marshall evidence that the Dutch guidelines have in practice failed to protect patients from involuntary euthanasia and have been violated with impunity. See, *e. g.*, H. Hendin, Seduced By Death 75–84 (1997) (noting many cases in which decisions intended to end the life of a fully competent patient were made without a request from the patient and without consulting the patient); Keown, Euthanasia in the Netherlands: Sliding Down the Slippery Slope?, in Euthanasia Examined 261, 289 (J. Keown ed. 1995) (guidelines have "proved signally ineffectual; non-voluntary euthanasia is now widely practised and increasingly condoned in the Netherlands"); Gomez, *supra,* at 104–113. This evidence is contested. See, *e. g.*, R. Epstein, Mortal Peril 322 (1997) ("Dutch physicians are not euthanasia enthusiasts and they are slow to practice it in individual cases"); R. Posner, Aging and Old Age 242, and n. 23 (1995) (noting fear of "doctors' rushing patients to their death" in the Netherlands "has not been substantiated and does not appear realistic"); Van der Wal, Van Eijk, Leenen, & Spreeuwenberg, Euthanasia and Assisted Suicide, 2, Do Dutch Family Doctors Act Prudently?, 9 Family Practice 135 (1992) (finding no serious abuse in Dutch practice). The day may come when we can say with some assurance which side is right, but for now it is the substantiality of the factual disagreement, and the alternatives for resolving it, that matter. They are, for me, dispositive of the due process claim at this time.

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[17] Again, the same can be said about life support and shortening life to kill pain, but the calculus may be viewed as different in these instances, as noted just above.

I take it that the basic concept of judicial review with its possible displacement of legislative judgment bars any finding that a legislature has acted arbitrarily when the following conditions are met: there is a serious factual controversy over the feasibility of recognizing the claimed right without at the same time making it impossible for the State to engage in an undoubtedly legitimate exercise of power; facts necessary to resolve the controversy are not readily ascertainable through the judicial process; but they are more readily subject to discovery through legislative factfinding and experimentation. It is assumed in this case, and must be, that a State's interest in protecting those unable to make responsible decisions and those who make no decisions at all entitles the State to bar aid to any but a knowing and responsible person intending suicide, and to prohibit euthanasia. How, and how far, a State should act in that interest are judgments for the State, but the legitimacy of its action to deny a physician the option to aid any but the knowing and responsible is beyond question.

The capacity of the State to protect the others if respondents were to prevail is, however, subject to some genuine question, underscored by the responsible disagreement over the basic facts of the Dutch experience. This factual controversy is not open to a judicial resolution with any substantial degree of assurance at this time. It is not, of course, that any controversy about the factual predicate of a due process claim disqualifies a court from resolving it. Courts can recognize captiousness, and most factual issues can be settled in a trial court. At this point, however, the factual issue at the heart of this case does not appear to be one of those. The principal enquiry at the moment is into the Dutch experience, and I question whether an independent front-line investigation into the facts of a foreign country's legal administration can be soundly undertaken through American courtroom litigation. While an extensive literature on any subject can raise the hopes for judicial understanding, the literature on this subject is only nascent. Since there is little experience directly bearing on the issue, the most that can be said is that whichever way the Court might rule today, events could overtake its assumptions, as experimentation in some jurisdictions confirmed or discredited the concerns about progression from assisted suicide to euthanasia.

Legislatures, on the other hand, have superior opportunities to obtain the facts necessary for a judgment about the present controversy. Not only do they have more flexible mechanisms for factfinding than the Judiciary, but their mechanisms include the power to experiment, moving forward and pulling back as facts emerge within their own jurisdictions. There is, indeed, good reason to suppose that in the absence of a judgment for respondents here, just such experimentation will be attempted in some of the States. See, *e. g.*, Ore. Rev. Stat. § 127.800 *et seq.* (Supp. 1996); App. to Brief for State Legislators as *Amici Curiae* 1a (listing proposed statutes).

I do not decide here what the significance might be of legislative foot dragging in ascertaining the facts going to the State's argument that the right in question could not be confined as claimed. Sometimes a court may be bound to act regardless of the institutional preferability of the political branches as forums for addressing constitutional claims. See, *e. g.*, *Bolling* v. *Sharpe*, 347 U. S. 497 (1954). Now, it is enough to say that our examination of legislative reasonableness should consider the fact that the Legislature of the State of Washington is no more obviously at fault than this Court is in being uncertain about what would happen if respondents prevailed today. We therefore have a clear question about which institution, a legislature or a court, is relatively more competent to deal with an emerging issue as to which facts currently unknown could be dispositive. The answer has to be, for the reasons already stated, that the legislative process is to be preferred. There is a closely related further reason as well.

One must bear in mind that the nature of the right claimed, if recognized as one constitutionally required, would differ in no essential way from other constitutional rights guaranteed by enumeration or derived from some more definite textual source than "due process." An unenumerated right should not therefore be recognized, with the effect of displacing the legislative ordering of things, without the assurance that its recognition would prove as durable as the recognition of those other rights differently derived. To recognize a right of lesser promise would simply create a constitutional regime too uncertain to bring with it the expectation of finality that is one of this Court's central obligations in making constitutional decisions. See *Casey*, 505 U. S., at 864–869.

Legislatures, however, are not so constrained. The experimentation that should be out of the question in constitutional adjudication displacing legislative judgments is entirely proper, as well as highly desirable, when the legislative power addresses an emerging issue like assisted suicide. The Court should accordingly stay its hand to allow reasonable legislative consideration. While I do not decide for all time that respondents' claim should not be recognized, I acknowledge the legislative institutional competence as the better one to deal with that claim at this time.

JUSTICE GINSBURG, concurring in the judgments.*

I concur in the Court's judgments in these cases substantially for the reasons stated by JUSTICE O'CONNOR in her concurring opinion, *ante*, p. 736.

JUSTICE BREYER, concurring in the judgments.†

I believe that JUSTICE O'CONNOR's views, which I share, have greater legal significance than the Court's opinion suggests. I join her separate opinion, except insofar as it joins the majority. And I concur in the judgments. I shall briefly explain how I differ from the Court.

I agree with the Court in *Vacco* v. *Quill*, *post*, at 800–809, that the articulated state interests justify the distinction

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*[This opinion applies also to No. 95–1858, *Vacco et al.* v. *Quill et al.*, *post*, p. 793.]

†[This opinion applies also to No. 95–1858, *Vacco et al.* v. *Quill et al.*, *post*, p. 793.]

drawn between physician assisted suicide and withdrawal of life support. I also agree with the Court that the critical question in both of the cases before us is whether "the 'liberty' specially protected by the Due Process Clause includes a right" of the sort that the respondents assert. *Washington* v. *Glucksberg, ante,* at 723. I do not agree, however, with the Court's formulation of that claimed "liberty" interest. The Court describes it as a "right to commit suicide with another's assistance." *Ante,* at 724. But I would not reject the respondents' claim without considering a different formulation, for which our legal tradition may provide greater support. That formulation would use words roughly like a "right to die with dignity." But irrespective of the exact words used, at its core would lie personal control over the manner of death, professional medical assistance, and the avoidance of unnecessary and severe physical suffering—combined.

As JUSTICE SOUTER points out, *ante,* at 762–765 (opinion concurring in judgment), Justice Harlan's dissenting opinion in *Poe* v. *Ullman,* 367 U. S. 497 (1961), offers some support for such a claim. In that opinion, Justice Harlan referred to the "liberty" that the Fourteenth Amendment protects as including "a freedom from all substantial arbitrary impositions and purposeless restraints" and also as recognizing that "*certain interests* require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Id.,* at 543. The "certain interests" to which Justice Harlan referred may well be similar (perhaps identical) to the rights, liberties, or interests that the Court today, as in the past, regards as "fundamental." *Ante,* at 720; see also *Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U. S. 833 (1992); *Eisenstadt* v. *Baird,* 405 U. S. 438 (1972); *Griswold* v. *Connecticut,* 381 U. S. 479 (1965); *Rochin* v. *California,* 342 U. S. 165 (1952); *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U. S. 535 (1942).

Justice Harlan concluded that marital privacy was such a "special interest." He found in the Constitution a right of "privacy of the home"—with the home, the bedroom, and "intimate details of the marital relation" at its heart—by examining the protection that the law had earlier provided for related, but not identical, interests described by such words as "privacy," "home," and "family." 367 U. S., at 548, 552; cf. *Casey, supra,* at 851. The respondents here essentially ask us to do the same. They argue that one can find a "right to die with dignity" by examining the protection the law has provided for related, but not identical, interests relating to personal dignity, medical treatment, and freedom from state-inflicted pain. See *Ingraham* v. *Wright,* 430 U. S. 651 (1977); *Cruzan* v. *Director, Mo. Dept. of Health,* 497 U. S. 261 (1990); *Casey, supra.*

I do not believe, however, that this Court need or now should decide whether or a not such a right is "fundamental." That is because, in my view, the avoidance of severe physical pain (connected with death) would have to constitute an essential part of any successful claim and because, as JUSTICE O'CONNOR points out, the laws before us do not *force* a dying person to undergo that kind of pain. *Ante,* at 736–737 (concurring opinion). Rather, the laws of New York and of Washington do not prohibit doctors from providing patients with drugs sufficient to control pain despite the risk that those drugs themselves will kill. Cf. New York State Task Force on Life and the Law, When Death Is Sought: Assisted Suicide and Euthanasia in the Medical Context 163, n. 29 (May 1994). And under these circumstances the laws of New York and Washington would overcome any remaining significant interests and would be justified, regardless.

Medical technology, we are repeatedly told, makes the administration of pain-relieving drugs sufficient, except for a very few individuals for whom the ineffectiveness of pain control medicines can mean not pain, but the need for sedation which can end in a coma. Brief for National Hospice Organization 8; Brief for American Medical Association (AMA) et al. as *Amici Curiae* 6; see also Byock, Consciously Walking the Fine Line: Thoughts on a Hospice Response to Assisted Suicide and Euthanasia, 9 J. Palliative Care 25, 26 (1993); New York State Task Force, at 44, and n. 37. We are also told that there are many instances in which patients do not receive the palliative care that, in principle, is available, *id.*, at 43–47; Brief for AMA as *Amici Curiae* 6; Brief for Choice in Dying, Inc., as *Amici Curiae* 20, but that is so for institutional reasons or inadequacies or obstacles, which would seem possible to overcome, and which do *not* include *a prohibitive set of laws. Ante,* at 736–737 (O'CONNOR, J., concurring); see also 2 House of Lords, Session 1993–1994 Report of Select Committee on Medical Ethics 113 (1994) (indicating that the number of palliative care centers in the United Kingdom, where physician assisted suicide is illegal, significantly exceeds that in the Netherlands, where such practices are legal).

This legal circumstance means that the state laws before us do not infringe directly upon the (assumed) central interest (what I have called the core of the interest in dying with dignity) as, by way of contrast, the state anticontraceptive laws at issue in *Poe* did interfere with the central interest there at stake—by bringing the State's police powers to bear upon the marital bedroom.

Were the legal circumstances different—for example, were state law to prevent the provision of palliative care, including the administration of drugs as needed to avoid pain at the end of life—then the law's impact upon serious and otherwise unavoidable physical pain (accompanying death) would be more directly at issue. And as JUSTICE O'CONNOR suggests, the Court might have to revisit its conclusions in these cases.

VACCO, ATTORNEY GENERAL OF NEW YORK, ET AL. *v.* QUILL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 95–1858. Argued January 8, 1997—Decided June 26, 1997

In New York, as in most States, it is a crime to aid another to commit or attempt suicide, but patients may refuse even lifesaving medical treatment. Respondent New York physicians assert that, although it would be consistent with the standards of their medical practices to prescribe lethal medication for mentally competent, terminally ill patients who are suffering great pain and desire a doctor's help in taking their own lives, they are deterred from doing so by New York's assisted-suicide ban. They, and three gravely ill patients who have since died, sued the State's Attorney General, claiming that the ban violates the Fourteenth Amendment's Equal Protection Clause. The Federal District Court disagreed, but the Second Circuit reversed, holding (1) that New York accords different treatment to those competent, terminally ill persons who wish to hasten their deaths by self-administering prescribed drugs than it does to those who wish to do so by directing the removal of life-support systems, and (2) that this supposed unequal treatment is not rationally related to any legitimate state interests.

Held: New York's prohibition on assisting suicide does not violate the Equal Protection Clause. Pp. 799–809.

(a) The Equal Protection Clause embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly. *E. g., Plyler* v. *Doe,* 457 U. S. 202, 216. The New York statutes outlawing assisted suicide neither infringe fundamental rights nor involve suspect classifications, *e. g., Washington* v. *Glucksberg, ante,* at 719–728, and are therefore entitled to a strong presumption of validity, *Heller* v. *Doe,* 509 U. S. 312, 319. On their faces, neither the assisted-suicide ban nor the law permitting patients to refuse medical treatment treats anyone differently from anyone else or draws any distinctions between persons. *Everyone,* regardless of physical condition, is entitled, if competent, to refuse unwanted lifesaving medical treatment; *no one* is permitted to assist a suicide. Generally, laws that apply evenhandedly to all unquestionably comply with equal protection. *E. g., New York City Transit Authority* v. *Beazer,* 440 U. S. 568, 587. This Court disagrees with the Second Circuit's submission that ending or refusing lifesaving medical treatment "is nothing more nor less than assisted suicide." The distinction between letting a patient die and making that patient die is important, logical, rational, and well established: It comports with fundamental legal principles of causation, see, *e. g., People* v. *Kevorkian,* 447 Mich. 436, 470–472, 527 N. W. 2d 714, 728, cert. denied, 514 U. S. 1083, and intent, see, *e. g., United States* v. *Bailey,* 444 U. S. 394, 403–406; has been recognized, at least implicitly, by this Court in *Cruzan* v. *Director, Mo. Dept. of Health,* 497 U. S. 261, 278-280; *id.,* at 287-288 (O'CONNOR, J., concurring); and has been widely recognized and endorsed in the medical profession, the state courts, and the overwhelming majority of state legislatures, which, like New York's, have permitted the former while prohibiting the latter. The Court therefore disagrees with respondents' claim that the distinction is "arbitrary" and "irrational." The line between the two acts may not always be clear, but certainty is not required, even were it possible. Logic and contemporary practice support New York's judgment that the two acts are different, and New York may therefore, consistent with the Constitution, treat them differently. Pp. 799–808.

(b) New York's reasons for recognizing and acting on the distinction between refusing treatment and assisting a suicide—including prohibiting intentional killing and preserving life; preventing suicide; maintaining physicians' role as their patients' healers; protecting vulnerable people from indifference, prejudice, and psychological and financial pressure to end their lives; and avoiding a possible slide toward euthanasia—are valid and important public interests that easily satisfy the constitutional requirement that a legislative classification bear a rational relation to some legitimate end. See *Glucksberg, ante.* Pp. 808–809.

80 F. 3d 716, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. O'CONNOR, J., filed a concurring opinion, in which GINSBURG and BREYER, JJ., joined in part, *ante,* p. 736. STEVENS, J., *ante,* p. 738, SOUTER, J., *post,* p. 809, GINSBURG, J., *ante,* p. 789, and BREYER, J., *ante,* p. 789, filed opinions concurring in the judgment.

Dennis C. Vacco, Attorney General of New York, *pro se,* argued the cause for petitioners. With him on the briefs were *Barbara Gott Billet,* Solicitor General, and *Daniel Smirlock* and *Michael S. Popkin,* Assistant Attorneys General.

Acting Solicitor General Dellinger argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General Hunger, Deputy Solicitor General Waxman, Deputy Assistant*

Attorney General Preston, Barbara C. Biddle, and *Ann Hubbard.*

Laurence H. Tribe argued the cause for respondents. With him on the brief were *Peter J. Rubin, Kathryn L. Tucker, David J. Burman, Kari Anne Smith,* and *Carla A. Kerr.**

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*Briefs of *amici curiae* urging reversal were filed for the State of California et al. by *Daniel E. Lungren,* Attorney General of California, *Robert L. Mukai,* Chief Assistant Attorney General, *Alvin J. Korobkin,* Senior Assistant Attorney General, and *Thomas S. Lazar,* Deputy Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Jeff Sessions* of Alabama, *Gale A. Norton* of Colorado, *Robert A. Butterworth* of Florida, *Michael J. Bowers* of Georgia, *James E. Ryan* of Illinois, *Thomas J. Miller* of Iowa, *Richard P. Ieyoub* of Louisiana, *J. Joseph Curran, Jr.,* of Maryland, *Frank J. Kelley* of Michigan, *Mike Moore* of Mississippi, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Jeffrey R. Howard* of New Hampshire, *Drew Edmondson* of Oklahoma, *Pedro R. Pierluisi* of Puerto Rico, *Charles Molony Condon* of South Carolina, *Mark W. Barnett* of South Dakota, *Charles W. Burson* of Tennessee, *James S. Gilmore III* of Virginia, and *Christine O. Gregoire* of Washington; for Wayne County, Michigan, by *John D. O'Hair* and *Timothy A. Baughman;* for Agudath Israel of America by *David Zwiebel* and *Morton M. Avigdor;* for the American Association of Homes and Services for the Aging et al. by *Joel G. Chefitz* and *Robert K. Niewijk;* for the American Center for Law and Justice by *Jay Alan Sekulow, James M. Henderson, Sr., Walter M. Weber, Keith A. Fournier, John G. Stepanovich,* and *Thomas P. Monaghan;* for the American Geriatrics Society by *John H. Pickering* and *Joseph E. Schmitz;* for the American Hospital Association by *Michael K. Kellogg* and *Margaret J. Hardy;* for the American Medical Association et al. by *Carter G. Phillips, Mark E. Haddad, Paul E. Kalb, Katherine L. Adams, Newton N. Minow, Jack R. Bierig, Kirk B. Johnson,* and *Michael L. Ile;* for the Catholic Health Association of the United States by *James A. Serritella, James C. Geoly, Kevin R. Gustafson, Thomas C. Shields, Peter M. Leibold,* and *Charles S. Gilham;* for the Catholic Medical Association by *Joseph J. Frank, Sergio Alvarez-Mena III,* and *Peter Buscemi;* for the Christian Legal Society et al. by *Edward J. Larson, Kimberlee Wood Colby,* and *Steven T. McFarland;* for the Clarendon Foundation by *Ronald D. Maines;* for the Evangelical Lutheran Church in America by *Edward McGlynn Gaffney, Jr., Susan D. Reece Martyn, Henry J. Bourguignon,* and *Phillip H. Harris;* for the Family Research Council by *Cathleen A. Cleaver, Mark A. Rothe,* and *Edward R. Grant;* for the Institute for Public Affairs of the Union of Orthodox Jewish

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In New York, as in most States, it is a crime to aid another to commit or attempt suicide,[1] but patients may refuse even

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Congregations of America et al. by *Richard B. Stone;* for the Medical Society of New Jersey by *Paul W. Armstrong* and *R. Bruce Crelin;* for the National Association of Prolife Nurses et al. by *Jacqulyn Kay Hall;* for the National Catholic Office for Persons with Disabilities et al. by *James Bopp, Jr., Thomas J. Marzen, Daniel Avila,* and *Jane E. T. Brockmann;* for the National Hospice Organization by *E. Barrett Prettyman, Jr.;* for the National Legal Center for the Medically Dependent & Disabled, Inc., et al. by *James Bopp, Jr., Thomas J. Marzen, Daniel Avila,* and *Jane E. T. Brockmann;* for the Project on Death in America et al. by *Robert A. Burt;* for the United States Catholic Conference et al. by *Mark E. Chopko;* for Senator Orrin Hatch et al. by *Michael W. McConnell;* for Members of the New York and Washington State Legislatures by *Paul Benjamin Linton* and *Clarke D. Forsythe;* for Bioethics Professors by *George J. Annas;* for Jerome J. De Cosse et al. by *Michael P. Tierney;* for Gary Lee, M. D., et al. by *James Bopp, Jr., Bary A. Bostrom,* and *Richard E. Coleson;* and for Richard Thompson by *Mr. Thompson, pro se,* and *Richard H. Browne.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Cameron Clark, Karen E. Boxx,* and *Steven R. Shapiro;* for Americans for Death with Dignity et al. by *John R. Reese* and *Page R. Barnes;* for the American Medical Student Association et al. by *John H. Hall;* for the Coalition of Hospice Professionals by *Gerald A. Rosenberg* and *Frances Kulka Browne;* for Gay Men's Health Crisis et al. by *Andrew I. Batavia;* for the National Women's Health Network et al. by *Sylvia A. Law;* for 36 Religious Organizations, Leaders, and Scholars by *Barbara McDowell* and *Gregory A. Castanias;* for the Washington State Psychological Association et al. by *Edward C. DuMont;* for Bioethicists by *Martin R. Gold* and *Robert P. Mulvey;* for Law Professors by *Charles H. Baron, David A. Hoffman,* and *Joshua M. Davis;* for State Legislators by *Sherry F. Colb;* and for Julian M. Whitaker, M. D., by *Jonathan W. Emord.*

Briefs of *amici curiae* were filed for the American College of Legal Medicine by *Miles J. Zaremski, Bruce C. Nelson,* and *Ila S. Rothschild;* for the American Life League, Inc., by *Charles E. Rice;* for Choice in Dying, Inc., by *Henry Putzel III;* for the International Anti-Euthanasia Task Force by *Wesley J. Smith;* for Not Dead Yet et al. by *Stephen F. Gold;* for Surviving Family Members in Support of Physician-Assisted Dying by *Katrin E. Frank, Robert A. Free,* and *Kathleen Wareham;* and for

[Footnote 1 is on p. 797]

lifesaving medical treatment.[2] The question presented by this case is whether New York's prohibition on assisting suicide therefore violates the Equal Protection Clause of the Fourteenth Amendment. We hold that it does not.

Petitioners are various New York public officials. Respondents Timothy E. Quill, Samuel C. Klagsbrun, and Howard A. Grossman are physicians who practice in New York. They assert that although it would be "consistent with the standards of [their] medical practice[s]" to prescribe lethal medication for "mentally competent, terminally ill patients" who are suffering great pain and desire a doctor's help in taking their own lives, they are deterred from doing so by New York's ban on assisting suicide. App. 25–26.[3] Respondents, and three gravely ill patients who have since died,[4] sued the State's Attorney General in the United States

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Ronald Dworkin et al. by *Mr. Dworkin, pro se, Peter L. Zimroth, Philip H. Curtis, Kent A. Yalowitz, Anand Agneshwar,* and *Abe Krash.*

[1] New York Penal Law § 125.15 (McKinney 1987) ("Manslaughter in the second degree") provides: "A person is guilty of manslaughter in the second degree when . . . (3) He intentionally causes or aids another person to commit suicide. Manslaughter in the second degree is a class C felony." Section 120.30 ("Promoting a suicide attempt") states: "A person is guilty of promoting a suicide attempt when he intentionally causes or aids another person to attempt suicide. Promoting a suicide attempt is a class E felony." See generally *Washington* v. *Glucksberg, ante,* at 710–719.

[2] "It is established under New York law that a competent person may refuse medical treatment, even if the withdrawal of such treatment will result in death." *Quill* v. *Koppell,* 870 F. Supp. 78, 84 (SDNY 1994); see N. Y. Pub. Health Law, §§ 2960–2979 (McKinney 1993 and Supp. 1997) ("Orders Not to Resuscitate") (regulating right of "adult with capacity" to direct issuance of orders not to resuscitate); *id.,* §§ 2980–2994 ("Health Care Agents and Proxies") (allowing appointment of agents "to make . . . health care decisions on the principal's behalf," including decisions to refuse lifesaving treatment).

[3] Declaration of Timothy E. Quill, M. D., App. 42–49; Declaration of Samuel C. Klagsbrun, M. D., *id.,* at 68–74; Declaration of Howard A. Grossman, M. D., *id.,* at 84–89; 80 F. 3d 716, 719 (CA2 1996).

[4] These three patients stated that they had no chance of recovery, faced the "prospect of progressive loss of bodily function and integrity and increasing pain and suffering," and desired medical assistance in ending

District Court. They urged that because New York permits a competent person to refuse life-sustaining medical treatment, and because the refusal of such treatment is "essentially the same thing" as physician-assisted suicide, New York's assisted-suicide ban violates the Equal Protection Clause. *Quill* v. *Koppell*, 870 F. Supp. 78, 84–85 (SDNY 1994).

The District Court disagreed: "[I]t is hardly unreasonable or irrational for the State to recognize a difference between allowing nature to take its course, even in the most severe situations, and intentionally using an artificial death-producing device." *Id.*, at 84. The court noted New York's "obvious legitimate interests in preserving life, and in protecting vulnerable persons," and concluded that "[u]nder the United States Constitution and the federal system it establishes, the resolution of this issue is left to the normal democratic processes within the State." *Id.*, at 84–85.

The Court of Appeals for the Second Circuit reversed. 80 F. 3d 716 (1996). The court determined that, despite the assisted-suicide ban's apparent general applicability, "New York law does not treat equally all competent persons who are in the final stages of fatal illness and wish to hasten their deaths," because "those in the final stages of terminal illness who are on life-support systems are allowed to hasten their deaths by directing the removal of such systems; but those who are similarly situated, except for the previous attachment of life-sustaining equipment, are not allowed to hasten death by self-administering prescribed drugs." *Id.*, at 727, 729. In the court's view, "[t]he ending of life by [the withdrawal of life-support systems] is *nothing more nor less than assisted suicide.*" *Id.*, at 729 (emphasis added). The Court of Appeals then examined whether this supposed unequal treatment was rationally related to any legitimate state

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their lives. App. 25–26; Declaration of William A. Barth, *id.*, at 96–98; Declaration of George A. Kingsley, *id.*, at 99–102; Declaration of Jane Doe, *id.*, at 105–109.

interests,[5] and concluded that "to the extent that [New York's statutes] prohibit a physician from prescribing medications to be self-administered by a mentally competent, terminally-ill person in the final stages of his terminal illness, they are not rationally related to any legitimate state interest." *Id.*, at 731. We granted certiorari, 518 U. S. 1055 (1996), and now reverse.

The Equal Protection Clause commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." This provision creates no substantive rights. *San Antonio Independent School Dist.* v. *Rodriguez,* 411 U. S. 1, 33 (1973); *id.*, at 59 (Stewart, J., concurring). Instead, it embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly. *Plyler* v. *Doe,* 457 U. S. 202, 216 (1982) ("'[T]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same'") (quoting *Tigner* v. *Texas,* 310 U. S. 141, 147 (1940)). If a legislative classification or distinction "neither burdens a fundamental right nor targets a suspect class, we will uphold [it] so long as it bears a rational relation to some legitimate end." *Romer* v. *Evans,* 517 U. S. 620, 631 (1996).

New York's statutes outlawing assisting suicide affect and address matters of profound significance to all New Yorkers alike. They neither infringe fundamental rights nor involve suspect classifications. *Washington* v. *Glucksberg, ante,* at 719–728; see 80 F. 3d, at 726; *San Antonio School Dist.*, 411 U. S., at 28 ("The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness"); *id.,* at 33–35 (courts must look to the Constitution, not the "importance" of the asserted right, when deciding whether an asserted right is "fundamental"). These laws are therefore entitled to a "strong presumption of validity." *Heller* v. *Doe,* 509 U. S. 312, 319 (1993).

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[5] The court acknowledged that because New York's assisted-suicide statutes "do not impinge on any fundamental rights [or] involve suspect classifications," they were subject only to rational-basis judicial scrutiny. 80 F. 3d, at 726–727.

On their faces, neither New York's ban on assisting suicide nor its statutes permitting patients to refuse medical treatment treat anyone differently from anyone else or draw any distinctions between persons. *Everyone,* regardless of physical condition, is entitled, if competent, to refuse unwanted lifesaving medical treatment; *no one* is permitted to assist a suicide. Generally speaking, laws that apply evenhandedly to all "unquestionably comply" with the Equal Protection Clause. *New York City Transit Authority* v. *Beazer,* 440 U. S. 568, 587 (1979); see *Personnel Administrator of Mass.* v. *Feeney,* 442 U. S. 256, 271–273 (1979) ("[M]any [laws] affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law").

The Court of Appeals, however, concluded that some terminally ill people—those who are on life-support systems—are treated differently from those who are not, in that the former may "hasten death" by ending treatment, but the latter may not "hasten death" through physician-assisted suicide. 80 F. 3d, at 729. This conclusion depends on the submission that ending or refusing lifesaving medical treatment "is nothing more nor less than assisted suicide." *Ibid.* Unlike the Court of Appeals, we think the distinction between assisting suicide and withdrawing life-sustaining treatment, a distinction widely recognized and endorsed in the medical profession[6] and in our legal traditions, is both important and logical; it is certainly rational. See *Feeney, supra,* at 272 ("When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern").

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[6] The American Medical Association emphasizes the "fundamental difference between refusing life-sustaining treatment and demanding a life-ending treatment." American Medical Association, Council on Ethical and Judicial Affairs, Physician-Assisted Suicide, 10 Issues in Law & Medicine 91, 93 (1994); see also American Medical Association, Council on Ethical and Judicial Affairs, Decisions Near the End of Life, 267 JAMA 2229, 2230–2231, 2233 (1992) ("The withdrawing or withholding of life-sustaining treatment is not inherently contrary to the principles of beneficence and nonmaleficence," but assisted suicide "is contrary to the prohibition

The distinction comports with fundamental legal principles of causation and intent. First, when a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication. See, *e. g., People* v. *Kevorkian,* 447 Mich. 436, 470–472, 527 N. W. 2d 714, 728 (1994), cert. denied, 514 U. S. 1083 (1995); *Matter of Conroy,* 98 N. J. 321, 355, 486 A. 2d 1209, 1226 (1985) (when feeding tube is removed, death "result[s] . . . from [the patient's] underlying medical condition"); *In re Colyer,* 99 Wash. 2d 114, 123, 660 P. 2d 738, 743 (1983) ("[D]eath which occurs after the removal of life sustaining systems is from natural causes"); American Medical Association, Council on Ethical and Judicial Affairs, Physician-Assisted Suicide, 10 Issues in Law & Medicine 91, 93 (1994) ("When a life-sustaining treatment is declined, the patient dies primarily because of an underlying disease").

Furthermore, a physician who withdraws, or honors a patient's refusal to begin, life-sustaining medical treatment purposefully intends, or may so intend, only to respect his patient's wishes and "to cease doing useless and futile or degrading things to the patient when [the patient] no longer stands to benefit from them." Assisted Suicide in the

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against using the tools of medicine to cause a patient's death"); New York State Task Force on Life and the Law, When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context 108 (1994) ("[Professional organizations] consistently distinguish assisted suicide and euthanasia from the withdrawing or withholding of treatment, and from the provision of palliative treatments or other medical care that risk fatal side effects"); Brief for American Medical Association et al. as *Amici Curiae* 18–25. Of course, as respondents' lawsuit demonstrates, there are differences of opinion within the medical profession on this question. See New York Task Force, *supra,* at 104–109.

United States, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 104th Cong., 2d Sess., 368 (1996) (testimony of Dr. Leon R. Kass). The same is true when a doctor provides aggressive palliative care; in some cases, painkilling drugs may hasten a patient's death, but the physician's purpose and intent is, or may be, only to ease his patient's pain. A doctor who assists a suicide, however, "must, necessarily and indubitably, intend primarily that the patient be made dead." *Id.*, at 367. Similarly, a patient who commits suicide with a doctor's aid necessarily has the specific intent to end his or her own life, while a patient who refuses or discontinues treatment might not. See, *e. g., Matter of Conroy, supra,* at 351, 486 A. 2d, at 1224 (patients who refuse life-sustaining treatment "may not harbor a specific intent to die" and may instead "fervently wish to live, but to do so free of unwanted medical technology, surgery, or drugs"); *Superintendent of Belchertown State School* v. *Saikewicz,* 373 Mass. 728, 743, n. 11, 370 N. E. 2d 417, 426, n. 11 (1977) ("[I]n refusing treatment the patient may not have the specific intent to die").

The law has long used actors' intent or purpose to distinguish between two acts that may have the same result. See, *e. g., United States* v. *Bailey,* 444 U. S. 394, 403–406 (1980) ("[T]he . . . common law of homicide often distinguishes . . . between a person who knows that another person will be killed as the result of his conduct and a person who acts with the specific purpose of taking another's life"); *Morissette* v. *United States,* 342 U. S. 246, 250 (1952) (distinctions based on intent are "universal and persistent in mature systems of law"); M. Hale, 1 Pleas of the Crown 412 (1847) ("If A. with an intent to prevent a gangrene beginning in his hand doth without any advice cut off his hand, by which he dies, he is not thereby *felo de se* for tho it was a voluntary act, yet it was not with an intent to kill himself"). Put differently, the law distinguishes actions taken "because of" a given end from actions taken "in spite of" their unintended but foreseen consequences. *Feeney*, 442 U. S., at 279; *Compassion in Dying* v. *Washington*, 79 F. 3d 790, 858 (CA9 1996) (Kleinfeld, J., dissenting) ("When General Eisenhower ordered American soldiers onto the beaches of Normandy, he knew that he was sending many American soldiers to certain death .... His purpose, though, was to . . . liberate Europe from the Nazis").

Given these general principles, it is not surprising that many courts, including New York courts, have carefully distinguished refusing life-sustaining treatment from suicide. See, *e. g., Fosmire* v. *Nicoleau*, 75 N. Y. 2d 218, 227, and n. 2, 551 N. E. 2d 77, 82, and n. 2 (1990) ("[M]erely declining medical care . . . is not considered a suicidal act").[7] In fact, the first state-court decision explicitly to authorize withdrawing lifesaving treatment noted the "real distinction between the self-infliction of deadly harm and a self-determination against artificial life support." *In re Quinlan*, 70 N. J. 10, 43, 52, and n. 9, 355 A. 2d 647, 665, 670, and n. 9, cert. denied *sub nom. Garger* v. *New Jersey*, 429 U. S. 922 (1976). And recently, the Michigan Supreme Court also rejected the argument that the distinction "between acts that artificially sustain life and acts that artificially curtail life" is merely a "distinction without constitutional significance—a meaningless exercise in semantic gymnastics," insisting that "the *Cruzan* majority disagreed and so do we." *Kevorkian,* 447 Mich., at 471, 527 N. W. 2d, at 728.[8]

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[7] Thus, the Second Circuit erred in reading New York law as creating a "right to hasten death"; instead, the authorities cited by the court recognize a right to refuse treatment, and nowhere equate the exercise of this right with suicide. *Schloendorff* v. *Society of New York Hospital*, 211 N. Y. 125, 129–130, 105 N. E. 92, 93 (1914), which contains Justice Cardozo's famous statement that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body," was simply an informed-consent case. See also *Rivers* v. *Katz*, 67 N. Y. 2d 485, 495, 495 N. E. 2d 337, 343 (1986) (right to refuse antipsychotic medication is not absolute, and may be limited when "the patient presents a danger to himself"); *Matter of Storar*, 52 N. Y. 2d 363, 377, n. 6, 420 N. E. 2d 64, 71, n. 6, cert. denied, 454 U. S. 858 (1981).

Similarly, the overwhelming majority of state legislatures have drawn a clear line between assisting suicide and withdrawing or permitting the refusal of unwanted lifesaving medical treatment by prohibiting the former and permitting the latter. *Glucksberg, ante,* at 710–711, 716–719. And "nearly all states expressly disapprove of suicide and assisted suicide either in statutes dealing with durable powers of attorney in health-care situations, or in 'living will' statutes." *Kevorkian, supra,* at 478–479, and nn. 53–54, 527 N. W. 2d, at 731–732, and nn. 53–54.[9] Thus, even as the

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[8] Many courts have recognized this distinction. See, *e. g., Kevorkian* v. *Thompson,* 947 F. Supp. 1152, 1178, and nn. 20–21 (ED Mich. 1997); *In re Fiori,* 543 Pa. 592, 602, 673 A. 2d 905, 910 (1996); *Singletary* v. *Costello,* 665 So. 2d 1099, 1106 (Fla. App. 1996); *Laurie* v. *Senecal,* 666 A. 2d 806, 808–809 (R. I. 1995); *State ex rel. Schuetzle* v. *Vogel,* 537 N. W. 2d 358, 360 (N. D. 1995); *Thor* v. *Superior Court,* 5 Cal. 4th 725, 741–742, 855 P. 2d 375, 385–386 (1993); *DeGrella* v. *Elston,* 858 S. W. 2d 698, 707 (Ky. 1993); *People* v. *Adams,* 216 Cal. App. 3d 1431, 1440, 265 Cal. Rptr. 568, 573–574 (1990); *Guardianship of Jane Doe,* 411 Mass. 512, 522–523, 583 N. E. 2d 1263, 1270, cert. denied *sub nom. Doe* v. *Gross,* 503 U. S. 950 (1992); *In re L. W.,* 167 Wis. 2d 53, 83, 482 N. W. 2d 60, 71 (1992); *In re Rosebush,* 195 Mich. App. 675, 681, n. 2, 491 N. W. 2d 633, 636, n. 2 (1992); *Donaldson* v. *Van de Kamp,* 2 Cal. App. 4th 1614, 1619–1625, 4 Cal. Rptr. 2d 59, 61–64 (1992); *In re Lawrance,* 579 N. E. 2d 32, 40, n. 4 (Ind. 1991); *McKay* v. *Bergstedt,* 106 Nev. 808, 822–823, 801 P. 2d 617, 626–627 (1990); *In re Browning,* 568 So. 2d 4, 14 (Fla. 1990); *McConnell* v. *Beverly Enterprises-Connecticut, Inc.,* 209 Conn. 692, 710, 553 A. 2d 596, 605 (1989); *State* v. *McAfee,* 259 Ga. 579, 581, 385 S. E. 2d 651, 652 (1989); *In re Grant,* 109 Wash. 2d 545, 563, 747 P. 2d 445, 454–455 (1987); *In re Gardner,* 534 A. 2d 947, 955–956 (Me. 1987); *Matter of Farrell,* 108 N. J. 335, 349–350, 529 A. 2d 404, 411 (1987); *Rasmussen* v. *Fleming,* 154 Ariz. 207, 218, 741 P. 2d 674, 685 (1987); *Bouvia* v. *Superior Court,* 179 Cal. App. 3d 1127, 1144–1145, 225 Cal. Rptr. 297, 306 (1986); *Von Holden* v. *Chapman,* 87 App. Div. 2d 66, 70, 450 N. Y. S. 2d 623, 627 (1982); *Bartling* v. *Superior Court,* 163 Cal. App. 3d 186, 196–197, 209 Cal. Rptr. 220, 225–226 (1984); *Foody* v. *Manchester Memorial Hospital,* 40 Conn. Supp. 127, 137, 482 A. 2d 713, 720 (1984); *In re P. V. W.,* 424 So. 2d 1015, 1022 (La. 1982); *Leach* v. *Akron General Medical Center,* 68 Ohio Misc. 1, 10, 426 N. E. 2d 809, 815 (Ohio Comm. Pleas 1980); *In re Severns,* 425 A. 2d 156, 161 (Del. Ch. 1980); *Satz* v. *Perlmutter,* 362 So. 2d 160, 162–163 (Fla. App. 1978); *Application of the President and Directors of Georgetown College,* 331 F. 2d 1000, 1009 (CADC), cert. denied, 377 U. S. 978 (1964); *Brophy* v. *New England Sinai Hospital,* 398 Mass. 417, 439, 497 N. E. 2d 626, 638 (1986). The British House of Lords has also recognized the distinction. *Airedale N. H. S. Trust* v. *Bland,* 2 W. L. R. 316, 368 (1993).

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[9] See Ala. Code § 22–8A–10 (1990); Alaska Stat. Ann. §§ 18.12.080(a), (f) (1996); Ariz. Rev. Stat. Ann. § 36–3210 (Supp. 1996); Ark. Code Ann. §§ 20–13–905(a), (f), 20–17–210(a), (g) (1991 and Supp. 1995); Cal. Health & Safety Code Ann. §§ 7191.5(a), (g) (West Supp. 1997); Cal. Prob. Code Ann. § 4723 (West Supp. 1997); Colo. Rev. Stat. §§ 15–14–504(4), 15–18–112(1), 15–18.5–101(3), 15–18.6–108 (1987 and Supp. 1996); Conn. Gen. Stat. § 19a–575 (Supp. 1996); Del. Code Ann., Tit. 16, § 2512 (Supp. 1996); D. C. Code Ann. §§ 6–2430, 21–2212 (1995 and Supp. 1996); Fla. Stat. §§ 765.309(1), (2) (Supp. 1997); Ga. Code Ann. §§ 31–32–11(b), 31–36–2(b) (1996); Haw. Rev. Stat. § 327D–13 (1996); Idaho Code § 39–152 (Supp. 1996); Ill. Comp. Stat., ch. 755, §§ 35/9(f), 40/5, 40/50, 45/2–1 (1992); Ind. Code §§ 16–36–1–13, 16–36–4–19, 30–5–5–17 (1994 and Supp. 1996); Iowa Code §§ 144A.11.1–144A.11.6, 144B.12.2 (1989 and Supp. 1997); Kan. Stat. Ann. § 65–28,109 (1985); Ky. Rev. Stat. Ann. § 311.638 (Baldwin Supp. 1992); La. Rev. Stat. Ann. §§ 40:1299.58.10(A), (B) (West 1992); Me. Rev. Stat. Ann., Tit. 18–A, §§ 5–813(b), (c) (Supp. 1996); Md. Health Code Ann. § 5–611(c) (1994); Mass. Gen. Laws 201D, § 12 (Supp. 1997); Mich. Comp. Laws Ann. § 700.496(20) (West 1995); Minn. Stat. §§ 145B.14, 145C.14 (Supp. 1997); Miss. Code Ann. §§ 41–41–117(2), 41–41–119(1) (Supp. 1992); Mo. Rev. Stat. §§ 459.015.3, 459.055(5) (1992); Mont. Code Ann. §§ 50–9–205(1), (7), 50–10–104(1), (6) (1995); Neb. Rev. Stat. §§ 20–412(1), (7), 30–3401(3) (1995); Nev. Rev. Stat. § 449.670(2) (1996); N. H. Rev. Stat. Ann. §§ 137–H:10, 137–H:13, 137–J:1 (1996); N. J. Stat. Ann. §§ 26:2H–54(d), (e), 26:2H–77 (West 1996); N. M. Stat. Ann. §§ 24–7A–13(B)(1), (C) (Supp. 1995); N. Y. Pub. Health Law § 2989(3) (McKinney 1993); N. C. Gen. Stat. §§ 90–320(b), 90–321(f) (1993); N. D. Cent. Code §§ 23–06.4–01, 23–06.5–01 (1991); Ohio Rev. Code Ann. §§ 2133.12(A), (D) (Supp. 1996); Okla. Stat., Tit. 63, §§ 3101.2(C), 3101.12(A), (G) (1997); 20 Pa. Cons. Stat. § 5402(b) (Supp. 1996); R. I. Gen. Laws §§ 23–4.10–9(a), (f), 23–4.11–10(a), (f) (1996); S. C. Code Ann. §§ 44–77–130, 44–78–50(A), (C), 62–5–504(O) (Supp. 1996); S. D. Codified Laws §§ 34–12D–14, 34–12D–20 (1994); Tenn. Code Ann. §§ 32–11–110(a), 39–13–216 (Supp. 1996); Tex.

States move to protect and promote patients' dignity at the end of life, they remain opposed to physician-assisted suicide.

New York is a case in point. The State enacted its current assisted-suicide statutes in 1965.[10] Since then, New York has acted several times to protect patients' common-law right to refuse treatment. Act of Aug. 7, 1987, ch. 818, § 1, 1987 N. Y. Laws 3140 ("Do Not Resuscitate Orders") (codified as amended at N. Y. Pub. Health Law §§ 2960–2979 (McKinney 1993 and Supp. 1997)); Act of July 22, 1990, ch. 752, § 2, 1990 N. Y. Laws 3547 ("Health Care Agents and Proxies") (codified as amended at N. Y. Pub. Health Law §§ 2980–2994 (McKinney 1993 and Supp. 1997)). In so doing, however, the State has neither endorsed a general right to "hasten death" nor approved physician-assisted suicide. Quite the opposite: The State has reaffirmed the line between "killing" and "letting die." See N. Y. Pub. Health Law § 2989(3) (McKinney 1993) ("This article is not intended to permit or promote suicide, assisted suicide, or euthanasia"); New York State Task Force on Life and the Law, Life-Sustaining Treatment: Making Decisions and Appointing a Health Care Agent 36–42 (July 1987); Do Not Resuscitate Orders: The Proposed Legislation and Report of the New York State Task Force on Life and the Law 15 (Apr. 1986). More recently, the New York State Task Force on Life and

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Health & Safety Code Ann. §§ 672.017, 672.020, 672.021 (1992); Utah Code Ann. §§ 75–2–1116, 75–2–1118 (1993); Vt. Stat. Ann., Tit. 18, § 5260 (1987); Va. Code Ann. § 54.1–2990 (1994); V. I. Code Ann., Tit. 19, §§ 198(a), (g) (1995); Wash. Rev. Code §§ 70.122.070(1), 70.122.100 (Supp. 1997); W. Va. Code §§ 16–30–10, 16–30A–16(a), 16–30B–2(b), 16–30B–13, 16–30C–14 (1995); Wis. Stat. §§ 154.11(1), (6), 154.25(7), 155.70(7) (Supp. 1996); Wyo. Stat. §§ 3–5–211, 35–22–109, 35–22–208 (1994 and Supp. 1996). See also 42 U. S. C. §§ 14402(b)(1), (2), (4) (1994 ed., Supp. III) ("Assisted Suicide Funding Restriction Act of 1997").

[10] It has always been a crime, either by statute or under the common law, to assist a suicide in New York. See Marzen, O'Dowd, Crone, & Balch, Suicide: A Constitutional Right?, 24 Duquesne L. Rev. 1, 205–210 (1985) (App.).

the Law studied assisted suicide and euthanasia and, in 1994, unanimously recommended against legalization. When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context vii (1994). In the Task Force's view, "allowing decisions to forgo life-sustaining treatment and allowing assisted suicide or euthanasia have radically different consequences and meanings for public policy." *Id.*, at 146.

This Court has also recognized, at least implicitly, the distinction between letting a patient die and making that patient die. In *Cruzan* v. *Director, Mo. Dept. of Health,* 497 U. S. 261, 278 (1990), we concluded that "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions," and we assumed the existence of such a right for purposes of that case, *id.*, at 279. But our assumption of a right to refuse treatment was grounded not, as the Court of Appeals supposed, on the proposition that patients have a general and abstract "right to hasten death," 80 F. 3d, at 727–728, but on well-established, traditional rights to bodily integrity and freedom from unwanted touching, *Cruzan,* 497 U. S., at 278–279; *id.*, at 287–288 (O'CONNOR, J., concurring). In fact, we observed that "the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide." *Id.*, at 280. *Cruzan* therefore provides no support for the notion that refusing life-sustaining medical treatment is "nothing more nor less than suicide."

For all these reasons, we disagree with respondents' claim that the distinction between refusing lifesaving medical treatment and assisted suicide is "arbitrary" and "irrational." Brief for Respondents 44.[11] Granted, in some cases, the line between the two may not be clear, but certainty is not required, even were it possible.[12] Logic and contemporary practice support New York's judgment that the two acts are different, and New York may therefore, consistent with the Constitution, treat them differently. By permitting everyone to refuse unwanted medical treatment while prohibiting anyone from assisting a suicide, New York law follows a longstanding and rational distinction.

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[11] Respondents also argue that the State irrationally distinguishes between physician-assisted suicide and "terminal sedation," a process respondents characterize as "induc[ing] barbiturate coma and then starv[ing] the person to death." Brief for Respondents 48–50; see 80 F. 3d,

New York's reasons for recognizing and acting on this distinction—including prohibiting intentional killing and preserving life; preventing suicide; maintaining physicians' role as their patients' healers; protecting vulnerable people from

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at 729. Petitioners insist, however, that "'[a]lthough proponents of physician-assisted suicide and euthanasia contend that terminal sedation is covert physician-assisted suicide or euthanasia, the concept of sedating pharmacotherapy is based on informed consent and the principle of double effect.'" Reply Brief for Petitioners 12 (quoting P. Rousseau, Terminal Sedation in the Care of Dying Patients, 156 Archives Internal Med. 1785, 1785–1786 (1996)). Just as a State may prohibit assisting suicide while permitting patients to refuse unwanted lifesaving treatment, it may permit palliative care related to that refusal, which may have the foreseen but unintended "double effect" of hastening the patient's death. See New York Task Force, When Death is Sought, *supra* n. 6, at 163 ("It is widely recognized that the provision of pain medication is ethically and professionally acceptable even when the treatment may hasten the patient's death, if the medication is intended to alleviate pain and severe discomfort, not to cause death").

[12] We do not insist, as JUSTICE STEVENS suggests, *ante*, at 750 (opinion concurring in judgments), that "in all cases there will in fact be a significant difference between the intent of the physicians, the patients, or the families [in withdrawal-of-treatment and physician-assisted-suicide cases]." See *supra*, at 801–802 ("[A] physician who withdraws, or honors a patient's refusal to begin, life-sustaining medical treatment purposefully intends, *or may so intend*, only to respect his patient's wishes . . . . The same is true when a doctor provides aggressive palliative care; . . . the physician's purpose and intent is, *or may be*, only to ease his patient's pain" (emphasis added)). In the absence of omniscience, however, the State is entitled to act on the reasonableness of the distinction.

indifference, prejudice, and psychological and financial pressure to end their lives; and avoiding a possible slide towards euthanasia—are discussed in greater detail in our opinion in *Glucksberg, ante.* These valid and important public interests easily satisfy the constitutional requirement that a legislative classification bear a rational relation to some legitimate end.[13]

The judgment of the Court of Appeals is reversed.

It is so ordered.

[For concurring opinion of JUSTICE O'CONNOR, see *ante,* p. 736; for opinions concurring in the judgments of JUSTICE STEVENS, see *ante,* p. 738, JUSTICE GINSBURG, see *ante,* p. 789, and JUSTICE BREYER, see *ante,* p. 789.]

JUSTICE SOUTER, concurring in the judgment.

Even though I do not conclude that assisted suicide is a fundamental right entitled to recognition at this time, I accord the claims raised by the patients and physicians in this case and *Washington* v. *Glucksberg* a high degree of importance, requiring a commensurate justification. See *Washington* v. *Glucksberg, ante,* at 782 (SOUTER, J., concurring in judgment). The reasons that lead me to conclude in *Glucksberg* that the prohibition on assisted suicide is not arbitrary under the due process standard also support the distinction between assistance to suicide, which is banned, and practices such as termination of artificial life support and death-hastening pain medication, which are permitted. I accordingly concur in the judgment of the Court.

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[13] JUSTICE STEVENS observes that our holding today "does not foreclose the possibility that some applications of the New York statute may impose an intolerable intrusion on the patient's freedom." *Ante,* at 751–752 (opinion concurring in judgments). This is true, but, as we observe in *Glucksberg, ante,* at 735, n. 24, a particular plaintiff hoping to show that New York's assisted-suicide ban was unconstitutional in his particular case would need to present different and considerably stronger arguments than those advanced by respondents here.

RAINES, DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET, ET AL. *v.* BYRD ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 96–1671. Argued May 27, 1997—Decided June 26, 1997

Appellees, Members of the 104th Congress, voted "nay" when Congress passed the Line Item Veto Act (Act), which gives the President the authority to cancel certain spending and tax benefit measures after he has signed them into law. The day after the Act went into effect, they filed suit against appellants, Executive Branch officials, challenging the Act's constitutionality. The District Court denied appellants' motion to dismiss, finding that appellees' claim that the Act diluted their Article I voting power was sufficient to confer Article III standing; and that their claim was ripe, even though the President had not yet used the Act's cancellation authority, because they found themselves in a position of unanticipated and unwelcome subservience to the President before and after their votes on appropriations bills. The court then granted appellees summary judgment, holding that the Act violated the Presentment Clause, Art. I, § 7, cl. 2, and constituted an unconstitutional delegation of legislative power to the President.

Held: Appellees lack standing to bring this suit. Pp. 818–830.

(a) The federal courts have jurisdiction over this dispute only if it is a case or controversy. Art. III, § 2. In order to meet the standing element of the case-or-controversy requirement, appellees must allege a personal injury that is particularized, concrete, and otherwise judicially cognizable. *Lujan* v. *Defenders of Wildlife,* 504 U. S. 555, 561; *Allen* v. *Wright,* 468 U. S. 737, 751. This Court insists on strict compliance with the jurisdictional standing requirement, see, *e. g., id.,* at 752, and its standing inquiry is especially rigorous when reaching the merits of a dispute would force it to decide the constitutionality of an action taken by one of the other two branches of the Federal Government. Pp. 818–820.

(b) This Court has never had occasion to rule on the legislative standing question presented here. Appellees are not helped by *Powell* v. *McCormack,* 395 U. S. 486, 496, 512–514, in which the Court held that a Congressman's challenge to the constitutionality of his exclusion from the House of Representatives presented an Article III case or controversy. Appellees have not been singled out for specially unfavorable treatment as opposed to other Members of their respective bodies, but claim that the Act causes a type of institutional injury which damages all Members of Congress equally. And their claim is based on a loss of political power, not loss of something to which they are personally entitled, such as their seats as Members of Congress after their constituents elected them. Pp. 820–821.

(c) Appellees' claim also does not fall within the Court's holding in *Coleman* v. *Miller*, 307 U. S. 433, the one case in which standing has been upheld for legislators claiming an institutional injury. There, the Court held that state legislators who had been locked in a tie vote that would have defeated the State's ratification of a proposed federal constitutional amendment, and who alleged that their votes were nullified when the Lieutenant Governor broke the tie by casting his vote for ratification, had "a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Id.*, at 438. In contrast, appellees have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated. In the vote on the Act, their votes were given full effect; they simply lost that vote. To uphold standing here would require a drastic extension of *Coleman*, even accepting appellees' argument that the Act has changed the "meaning" and "effectiveness" of their vote on appropriations bills, for there is a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional power appellees allege. Pp. 821–826.

(d) Historical practice cuts against appellees' position as well. Several episodes in our history show that in analogous confrontations between one or both Houses of Congress and the Executive Branch, no suit was brought on the basis of claimed injury to official authority or power. If appellees' claim were sustained, presumably several Presidents would have had standing to challenge the Tenure of Office Act, which prevented the removal of a Presidential appointee without Congress' consent; the Attorney General could have challenged the one-House veto provision because it rendered his authority provisional rather than final; President Ford could have challenged the Federal Election Campaign Act's appointment provisions which were struck down in *Buckley* v. *Valeo*, 424 U. S. 1; and a Member of Congress could have challenged the validity of President Coolidge's pocket veto that was sustained in *The Pocket Veto Case*, 279 U. S. 655. While a system granting such standing would not be irrational, our Constitution's regime contemplates a more restrictive role for Article III courts. See *United States* v. *Richardson*, 418 U. S. 166, 192 (Powell, J., concurring). Pp. 826–829.

(e) Some importance must be attached to the fact that appellees have not been authorized to represent their respective Houses in this action, and indeed both Houses actively oppose their suit. In addition, the conclusion reached here neither deprives Members of Congress of an adequate remedy—since they may repeal the Act or exempt appropriations bills from its reach—nor forecloses the Act from constitutional challenge by someone who suffers judicially cognizable injury resulting from it. Pp. 829–830.

956 F. Supp. 25, vacated and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, THOMAS, and GINSBURG, JJ., joined. SOUTER, J., filed an opinion concurring in the judgment, in which GINSBURG, J., joined, *post*, p. 830. STEVENS, J., *post*, p. 835, and BREYER, J., *post*, p. 838, filed dissenting opinions.

Acting Solicitor General Dellinger argued the cause for appellants. With him on the briefs were *Assistant Attorney General Hunger, Deputy Solicitor General Kneedler, Malcolm L. Stewart,* and *Douglas N. Letter.*

Alan B. Morrison argued the cause for appellees. With him on the briefs were *Lloyd N. Cutler, Louis R. Cohen, Charles J. Cooper, Michael A. Carvin, David Thompson,* and *Michael Davidson.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.†

The District Court for the District of Columbia declared the Line Item Veto Act unconstitutional. On this direct appeal, we hold that appellees lack standing to bring this suit, and therefore direct that the judgment of the District Court be vacated and the complaint dismissed.

**Thomas B. Griffith, Morgan J. Frankel, Steven F. Huefner, Geraldine R. Gennet, Kerry W. Kircher,* and *Michael L. Stern* filed a brief for the United States Senate et al. as *amici curiae* urging reversal.

Briefs of *amicus curiae* urging affirmance were filed for the Association of the Bar of the City of New York by *David P. Felsher, Louis A. Craco, Jr.,* and *James F. Parver;* and for David Schoenbrod et al. by *Mr. Schoenbrod, pro se,* and *Marci A. Hamilton, pro se.*

G. William Frick filed a brief for the American Petroleum Institute as *amicus curiae.*

†JUSTICE GINSBURG joins this opinion.

I

The appellees are six Members of Congress, four of whom served as Senators and two of whom served as Congressmen in the 104th Congress (1995–1996).[1] On March 27, 1996, the Senate passed a bill entitled the Line Item Veto Act by a vote of 69 to 31. All four appellee Senators voted "nay." 142 Cong. Rec. S2995. The next day, the House of Representatives passed the identical bill by a vote of 232 to 177. Both appellee Congressmen voted "nay." *Id.*, at H2986. On April 4, 1996, the President signed the Line Item Veto Act (Act) into law. Pub. L. 104–130, 110 Stat. 1200, codified at 2 U. S. C. § 691 *et seq.* (1994 ed., Supp. II). The Act went into effect on January 1, 1997. See Pub. L. 104–130, § 5. The next day, appellees filed a complaint in the District Court for the District of Columbia against the two appellants, the Secretary of the Treasury and the Director of the Office of Management and Budget, alleging that the Act was unconstitutional.

The provisions of the Act do not use the term "veto." Instead, the President is given the authority to "cancel" certain spending and tax benefit measures after he has signed them into law. Specifically, the Act provides:

> "[T]he President may, with respect to any bill or joint resolution that has been signed into law pursuant to Article I, section 7, of the Constitution of the United States, cancel in whole—(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit; if the President—

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[1] Three of the Senators—Robert Byrd, Carl Levin, and Daniel Patrick Moynihan—are still Senators. The fourth—Mark Hatfield—retired at the end of the 104th Congress. The two Congressmen—David Skaggs and Henry Waxman—remain Congressmen.

> "(A) determines that such cancellation will—(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest; and
>
> "(B) notifies the Congress of such cancellation by transmitting a special message . . . within five calendar days (excluding Sundays) after the enactment of the law [to which the cancellation applies]." § 691(a) (some indentations omitted).

The President's "cancellation" under the Act takes effect when the "special message" notifying Congress of the cancellation is received in the House and Senate. With respect to dollar amounts of "discretionary budget authority," a cancellation means "to rescind." § 691e(4)(A). With respect to "new direct spending" items or "limited tax benefit[s]," a cancellation means that the relevant legal provision, legal obligation, or budget authority is "prevent[ed] . . . from having legal force or effect." §§ 691e(4)(B), (C).

The Act establishes expedited procedures in both Houses for the consideration of "disapproval bills," § 691d, bills or joint resolutions which, if enacted into law by the familiar procedures set out in Article I, § 7, of the Constitution, would render the President's cancellation "null and void," § 691b(a). "Disapproval bills" may only be one sentence long and must read as follows after the enacting clause: "That Congress disapproves of cancellations ________ as transmitted by the President in a special message on ________ regarding ________." § 691e(6)(C). (The blank spaces correspond to the cancellation reference numbers as set out in the special message, the date of the President's special message, and the public law number to which the special message relates, respectively. *Ibid.*)

The Act provides that "[a]ny Member of Congress or any individual adversely affected by [this Act] may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on the ground that any provision of this part violates the Constitution." § 692(a)(1). Appellees brought suit under this provision, claiming that "[t]he Act violates Article I" of the Constitution. Complaint ¶ 17. Specifically, they alleged that the Act "unconstitutionally expands the President's power," and "violates the requirements of bicameral passage and presentment by granting to the President, acting alone, the authority to 'cancel' and thus repeal provisions of federal law." *Ibid.* They alleged that the Act injured them "directly and concretely . . . in their official capacities" in three ways:

> "The Act . . . (a) alter[s] the legal and practical effect of all votes they may cast on bills containing such separately vetoable items, (b) divest[s] the [appellees] of their constitutional role in the repeal of legislation, and (c) alter[s] the constitutional balance of powers between the Legislative and Executive Branches, both with respect to measures containing separately vetoable items and with respect to other matters coming before Congress." *Id.*, ¶ 14.

Appellants moved to dismiss for lack of jurisdiction, claiming (among other things) that appellees lacked standing to sue and that their claim was not ripe. Both sides also filed motions for summary judgment on the merits. On April 10, 1997, the District Court (i) denied appellants' motion to dismiss, holding that appellees had standing to bring this suit and that their claim was ripe, and (ii) granted appellees' summary judgment motion, holding that the Act is unconstitutional. 956 F. Supp. 25. As to standing, the court noted that the Court of Appeals for the District of Columbia "has repeatedly recognized Members' standing to challenge measures that affect their constitutionally prescribed lawmaking powers." *Id.*, at 30 (citing, *e. g., Michel* v. *Anderson,* 14 F. 3d 623, 625 (CADC 1994); *Moore* v. *U. S. House of Representatives,* 733 F. 2d 946, 950–952 (CADC 1984)). See also 956

F. Supp., at 31 ("[T]he Supreme Court has never endorsed the [Court of Appeals'] analysis of standing in such cases"). The court held that appellees' claim that the Act "dilute[d] their Article I voting power" was sufficient to confer Article III standing: "[Appellees'] votes mean something different from what they meant before, for good or ill, and [appellees] who perceive it as the latter are thus 'injured' in a constitutional sense whenever an appropriations bill comes up for a vote, whatever the President ultimately does with it. . . . Under the Act the dynamic of lawmaking is fundamentally altered. Compromises and trade-offs by individual lawmakers must take into account the President's item-by-item cancellation power looming over the end product." *Ibid.*

The court held that appellees' claim was ripe even though the President had not yet used the "cancellation" authority granted him under the Act: "Because [appellees] now find themselves in a position of unanticipated and unwelcome subservience to the President before and after they vote on appropriations bills, Article III is satisfied, and this Court may accede to Congress' directive to address the constitutional cloud over the Act as swiftly as possible." *Id.*, at 32 (referring to § 692(a)(1), the section of the Act granting Members of Congress the right to challenge the Act's constitutionality in court). On the merits, the court held that the Act violated the Presentment Clause, Art. I, § 7, cl. 2, and constituted an unconstitutional delegation of legislative power to the President. 956 F. Supp., at 33, 35, 37–38.

The Act provides for a direct, expedited appeal to this Court. § 692(b) (direct appeal to Supreme Court); § 692(c) ("It shall be the duty of . . . the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any [suit challenging the Act's constitutionality] brought under [§ 3(a) of the Act]"). On April 18, eight days after the District Court issued its order, appellants filed a jurisdictional statement asking us to note probable jurisdiction, and on April 21, appellees filed a memorandum in response agreeing that we should note probable jurisdiction. On April 23, we did so. 520 U. S. 1194 (1997). We established an expedited briefing schedule and heard oral argument on May 27.[2] We now hold that appellees have no standing to bring this suit, and therefore direct that the judgment of the District Court be vacated and the complaint dismissed.

II

Under Article III, §2, of the Constitution, the federal courts have jurisdiction over this dispute between appellants and appellees only if it is a "case" or "controversy." This is a "bedrock requirement." *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 471 (1982). As we said in *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 37 (1976): "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."

One element of the case-or-controversy requirement is that appellees, based on their complaint, must establish that they have standing to sue. *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 561 (1992) (plaintiff bears burden of establishing standing). The standing inquiry focuses on whether the plaintiff is the proper party to bring this suit, *Simon, supra*, at 38, although that inquiry "often turns on the nature and source of the claim asserted," *Warth* v. *Seldin*, 422 U. S. 490, 500 (1975). To meet the standing requirements of Article III, "[a] plaintiff must allege *personal injury* fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen* v. *Wright*, 468

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[2] The House Bipartisan Legal Advisory Group (made up of the Speaker, the Majority Leader, the Minority Leader, and the two Whips) and the Senate filed a joint brief as *amici curiae* urging that the District Court be reversed on the merits. Their brief states that they express no position as to appellees' standing.

U. S. 737, 751 (1984) (emphasis added). For our purposes, the italicized words in this quotation from *Allen* are the key ones. We have consistently stressed that a plaintiff's complaint must establish that he has a "personal stake" in the alleged dispute, and that the alleged injury suffered is particularized as to him. See, *e. g., Lujan, supra,* at 560–561, and n. 1 (to have standing, the plaintiff must have suffered a "particularized" injury, which means that "the injury must affect the plaintiff in a personal and individual way"); *Bender* v. *Williamsport Area School Dist.,* 475 U. S. 534, 543–544 (1986) (school board member who "has no personal stake in the outcome of the litigation" has no standing); *Simon, supra,* at 39 ("The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art. III requirement").

We have also stressed that the alleged injury must be legally and judicially cognizable. This requires, among other things, that the plaintiff have suffered "an invasion of a legally protected interest which is . . . concrete and particularized," *Lujan, supra,* at 560, and that the dispute is "traditionally thought to be capable of resolution through the judicial process," *Flast* v. *Cohen,* 392 U. S. 83, 97 (1968). See also *Allen,* 468 U. S., at 752 ("Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable?").

We have always insisted on strict compliance with this jurisdictional standing requirement. See, *e. g., ibid.* (under Article III, "federal courts may exercise power only 'in the last resort, and as a necessity' ") (quoting *Chicago & Grand Trunk R. Co.* v. *Wellman,* 143 U. S. 339, 345 (1892)); *Muskrat* v. *United States,* 219 U. S. 346, 356 (1911) ("[F]rom its earliest history this [C]ourt has consistently declined to exercise any powers other than those which are strictly judicial in their nature"). And our standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional. See, *e. g., Bender, supra,* at 542; *Valley Forge, supra,* at 473–474. As we said in *Allen, supra,* at 752, "the law of Art. III standing is built on a single basic idea—the idea of separation of powers." In the light of this overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere,[3] we must put aside the natural urge to proceed directly to the merits of this important dispute and to "settle" it for the sake of convenience and efficiency. Instead, we must carefully inquire as to whether appellees have met their burden of establishing that their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable.

III

We have never had occasion to rule on the question of legislative standing presented here.[4] In *Powell* v. *McCormack,* 395 U. S. 486, 496, 512–514 (1969), we held that a Member of

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[3] It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing. *Gladstone, Realtors* v. *Village of Bellwood,* 441 U. S. 91, 100 (1979). We acknowledge, though, that Congress' decision to grant a particular plaintiff the right to challenge an Act's constitutionality (as here, see § 692(a)(1), *supra,* at 815–816) eliminates any prudential standing limitations and significantly lessens the risk of unwanted conflict with the Legislative Branch when that plaintiff brings suit. See, *e. g., Bennett* v. *Spear,* 520 U. S. 154, 164–166 (1997).

[4] Over strong dissent, the Court of Appeals for the District of Columbia Circuit has held that Members of Congress may have standing when (as here) they assert injury to their institutional power as legislators. See, *e. g., Kennedy* v. *Sampson,* 511 F. 2d 430, 435–436 (CADC 1974); *Moore* v. *United States House of Representatives,* 733 F. 2d 946, 951 (CADC 1984); *id.,* at 956 (Scalia, J., concurring in result); *Barnes* v. *Kline,* 759 F. 2d 21, 28–29 (CADC 1985); *id.,* at 41 (Bork, J., dissenting). But see *Holtzman* v. *Schlesinger,* 484 F. 2d 1307, 1315 (CA2 1973) (Member of Congress has no standing to challenge constitutionality of American military operations in Vietnam war); *Harrington* v. *Schlesinger,* 528 F. 2d 455, 459 (CA4 1975) (same).

Congress' constitutional challenge to his exclusion from the House of Representatives (and his consequent loss of salary) presented an Article III case or controversy. But *Powell* does not help appellees. First, appellees have not been singled out for specially unfavorable treatment as opposed to other Members of their respective bodies. Their claim is that the Act causes a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally. See n. 7, *infra.* Second, appellees do not claim that they have been deprived of something to which they *personally* are entitled—such as their seats as Members of Congress after their constituents had elected *them.* Rather, appellees' claim of standing is based on a loss of political power, not loss of any private right, which would make the injury more concrete. Unlike the injury claimed by Congressman Adam Clayton Powell, the injury claimed by the Members of Congress here is not claimed in any private capacity but solely because they are Members of Congress. See Complaint ¶ 14 (purporting to sue "in their official capacities"). If one of the Members were to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead. The claimed injury thus runs (in a sense) with the Member's seat, a seat which the Member holds (it may quite arguably be said) as trustee for his constituents, not as a prerogative of personal power. See The Federalist No. 62, p. 378 (J. Madison) (C. Rossiter ed. 1961) ("It is a misfortune incident to republican government, though in a less degree than to other governments, that those who administer it may forget their obligations to their constituents and prove unfaithful to their important trust").

The one case in which we have upheld standing for legislators (albeit *state* legislators) claiming an institutional injury is *Coleman* v. *Miller*, 307 U. S. 433 (1939). Appellees, relying heavily on this case, claim that they, like the state legislators in *Coleman*, "have a plain, direct and adequate interest in maintaining the effectiveness of their votes," *id.*, at 438, sufficient to establish standing. In *Coleman,* 20 of Kansas' 40 State Senators voted not to ratify the proposed "Child Labor Amendment" to the Federal Constitution. With the vote deadlocked 20 to 20, the amendment ordinarily would not have been ratified. However, the State's Lieutenant Governor, the presiding officer of the State Senate, cast a deciding vote in favor of the amendment, and it was deemed ratified (after the State House of Representatives voted to ratify it). The 20 State Senators who had voted against the amendment, joined by a 21st State Senator and three State House Members, filed an action in the Kansas Supreme Court seeking a writ of mandamus that would compel the appropriate state officials to recognize that the legislature had not in fact ratified the amendment. That court held that the members of the legislature had standing to bring their mandamus action, but ruled against them on the merits. See *id.*, at 436–437.

This Court affirmed. By a vote of 5–4, we held that the members of the legislature had standing.[5] In explaining our holding, we repeatedly emphasized that if these legislators (who were suing as a bloc) were correct on the merits, then their votes not to ratify the amendment were deprived of all validity:

> "Here, the plaintiffs include twenty senators, whose votes against ratification have been *overridden* and *vir-*

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[5] Chief Justice Hughes wrote an opinion styled "the opinion of the Court." *Coleman,* 307 U. S., at 435. Four Justices concurred in the judgment, partially on the ground that the legislators lacked standing. See *id.*, at 456–457 (opinion of Black, J., joined by Roberts, Frankfurter, and Douglas, JJ.); *id.*, at 460 (opinion of Frankfurter, J., joined by Roberts, Black, and Douglas, JJ.). Two Justices dissented on the merits. See *id.*, at 470 (opinion of Butler, J., joined by McReynolds, J.). Thus, even though there were only two Justices who joined Chief Justice Hughes' opinion on the merits, it is apparent that the two dissenting Justices joined his opinion as to the standing discussion. Otherwise, Justice Frankfurter's opinion denying standing would have been the controlling opinion.

> *tually held for naught* although if they are right in their contentions *their votes would have been sufficient to defeat ratification.* We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Id.*, at 438 (emphasis added).
>
> "[T]he twenty senators were not only qualified to vote on the question of ratification but *their votes,* if the Lieutenant Governor were excluded as not being a part of the legislature for that purpose, *would have been decisive in defeating the ratifying resolution.*" *Id.*, at 441 (emphasis added).
>
> "[W]e find no departure from principle in recognizing in the instant case that *at least the twenty senators whose votes,* if their contention were sustained, *would have been sufficient to defeat the resolution* ratifying the proposed constitutional amendment, have an interest in the controversy which, treated by the state court as a basis for entertaining and deciding the federal questions, is sufficient to give the Court jurisdiction to review that decision." *Id.*, at 446 (emphasis added).

It is obvious, then, that our holding in *Coleman* stands (at most, see n. 8, *infra*) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.[6]

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[6] See also *Bender* v. *Williamsport Area School Dist.*, 475 U. S. 534, 544–545, n. 7 (1986) (in dicta, suggesting hypothetically that if state law authorized a school board to take action only by unanimous consent, if a school board member voted against a particular action, and if the board nonetheless took the action, the board member "might claim that he was legally entitled to protect 'the effectiveness of [his] vot[e],' *Coleman*[, 307 U. S., at 438,] . . . [b]ut in that event [he] would have to allege that his vote was diluted or rendered nugatory under state law").

It should be equally obvious that appellees' claim does not fall within our holding in *Coleman,* as thus understood. They have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated. In the vote on the Act, their votes were given full effect. They simply lost that vote.[7] Nor can they allege that the Act will nullify their votes in the future in the same way that the votes of the *Coleman* legislators had been nullified. In the future, a majority of Senators and Congressmen can pass or reject appropriations bills; the Act has no effect on this process. In addition, a majority of Senators and Congressmen can vote to repeal the Act, or to exempt a given appropriations bill (or a given provision in an appropriations bill) from the Act; again, the Act has no effect on this process. *Coleman* thus provides little meaningful precedent for appellees' argument.[8]

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[7] Just as appellees cannot show that their vote was denied or nullified as in *Coleman* (in the sense that a bill they voted for would have become law if their vote had not been stripped of its validity), so are they unable to show that their vote was denied or nullified in a discriminatory manner (in the sense that their vote was denied its full validity in relation to the votes of their colleagues). Thus, the various hypotheticals offered by appellees in their briefs and discussed during oral argument have no applicability to this case. See Reply Brief for Appellees 6 (positing hypothetical law in which "first-term Members were not allowed to vote on appropriations bills," or in which "*every* Member was disqualified on grounds of partiality from voting on major federal projects in his or her own district"); Tr. of Oral Arg. 17 ("QUESTION: But [Congress] might have passed a statute that said the Senators from Iowa on hog-farming matters should have only a half-a-vote. Would they have standing to challenge that?").

[8] Since we hold that *Coleman* may be distinguished from the instant case on this ground, we need not decide whether *Coleman* may also be distinguished in other ways. For instance, appellants have argued that *Coleman* has no applicability to a similar suit brought in federal court, since that decision depended on the fact that the Kansas Supreme Court "treated" the senators' interest in their votes "as a basis for entertaining and deciding the federal questions." 307 U. S., at 446. They have also

Nevertheless, appellees rely heavily on our statement in *Coleman* that the Kansas senators had "a plain, direct and adequate interest in maintaining the effectiveness of their votes." Appellees claim that this statement applies to them because their votes on future appropriations bills (assuming a majority of Congress does not decide to exempt those bills from the Act) will be less "effective" than before, and that the "meaning" and "integrity" of their vote has changed. Brief for Appellees 24, 28. The argument goes as follows. Before the Act, Members of Congress could be sure that when they voted for, and Congress passed, an appropriations bill that included funds for Project X, one of two things would happen: (i) the bill would become law and all of the projects listed in the bill would go into effect, or (ii) the bill would not become law and none of the projects listed in the bill would go into effect. Either way, a vote for the appropriations bill meant a vote for a package of projects that were inextricably linked. After the Act, however, a vote for an appropriations bill that includes Project X means something different. Now, in addition to the two possibilities listed above, there is a third option: The bill will become law and then the President will "cancel" Project X.[9]

Even taking appellees at their word about the change in the "meaning" and "effectiveness" of their vote for appropriations bills which are subject to the Act, we think their argument pulls *Coleman* too far from its moorings. Appellees'

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argued that *Coleman* has no applicability to a similar suit brought by federal legislators, since the separation-of-powers concerns present in such a suit were not present in *Coleman*, and since any federalism concerns were eliminated by the Kansas Supreme Court's decision to take jurisdiction over the case.

[9] Although Congress could reinstate Project X through a "disapproval bill," it would assumedly take two-thirds of both Houses to do so, since the President could be expected to veto the Project X "disapproval bill." But see Robinson, Public Choice Speculations on the Item Veto, 74 Va. L. Rev. 403, 411–412 (1988) (political costs that President would suffer in important congressional districts might limit use of line-item veto).

use of the word "effectiveness" to link their argument to *Coleman* stretches the word far beyond the sense in which the *Coleman* opinion used it. There is a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power that is alleged here. To uphold standing here would require a drastic extension of *Coleman*. We are unwilling to take that step.

Not only do appellees lack support from precedent, but historical practice appears to cut against them as well. It is evident from several episodes in our history that in analogous confrontations between one or both Houses of Congress and the Executive Branch, no suit was brought on the basis of claimed injury to official authority or power. The Tenure of Office Act, passed by Congress over the veto of President Andrew Johnson in 1867, was a thorn in the side of succeeding Presidents until it was finally repealed at the behest of President Grover Cleveland in 1887. See generally W. Rehnquist, Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson 210–235, 260–268 (1992). It provided that an official whose appointment to an Executive Branch office required confirmation by the Senate could not be removed without the consent of the Senate. 14 Stat. 430, ch. 154. In 1868, Johnson removed his Secretary of War, Edwin M. Stanton. Within a week, the House of Representatives impeached Johnson. 1 Trial of Andrew Johnson, President of the United States, Before the Senate of the United States on Impeachment by the House of Representatives for High Crimes and Misdemeanors 4 (1868). One of the principal charges against him was that his removal of Stanton violated the Tenure of Office Act. *Id.*, at 6–8. At the conclusion of his trial before the Senate, Johnson was acquitted by one vote. 2 *id.*, at 487, 496–498. Surely Johnson had a stronger claim of diminution of his official power as a result of the Tenure of Office Act than do the appellees in the present case. Indeed, if their claim were sustained, it would appear that President Johnson would have had standing to challenge the Tenure of Office Act before he ever thought about firing a cabinet member, simply on the grounds that it altered the calculus by which he would nominate someone to his cabinet. Yet if the federal courts had entertained an action to adjudicate the constitutionality of the Tenure of Office Act immediately after its passage in 1867, they would have been improperly and unnecessarily plunged into the bitter political battle being waged between the President and Congress.

Succeeding Presidents—Ulysses S. Grant and Grover Cleveland—urged Congress to repeal the Tenure of Office Act, and Cleveland's plea was finally heeded in 1887. 24 Stat. 500, ch. 353. It occurred to neither of these Presidents that they might challenge the Act in an Article III court. Eventually, in a suit brought by a plaintiff with traditional Article III standing, this Court did have the opportunity to pass on the constitutionality of the provision contained in the Tenure of Office Act. A sort of mini-Tenure of Office Act covering only the Post Office Department had been enacted in 1872, 17 Stat. 284, ch. 335, § 2, and it remained on the books after the Tenure of Office Act's repeal in 1887. In the last days of the Woodrow Wilson administration, Albert Burleson, Wilson's Postmaster General, came to believe that Frank Myers, the Postmaster in Portland, Oregon, had committed fraud in the course of his official duties. When Myers refused to resign, Burleson, acting at the direction of the President, removed him. Myers sued in the Court of Claims to recover lost salary. In *Myers* v. *United States*, 272 U. S. 52 (1926), more than half a century after Johnson's impeachment, this Court held that Congress could not require senatorial consent to the removal of a Postmaster who had been appointed by the President with the consent of the Senate. *Id.*, at 106–107, 173, 176. In the course of its opinion, the Court expressed the view that the original Tenure of Office Act was unconstitutional. *Id.*, at 176. See also *id.*, at 173 ("This Court has, since the Tenure of Office Act, manifested an earnest desire to avoid a final settlement of the question until it should be inevitably presented, as it is here").

If the appellees in the present case have standing, presumably President Wilson, or Presidents Grant and Cleveland before him, would likewise have had standing, and could have challenged the law preventing the removal of a Presidential appointee without the consent of Congress. Similarly, in *INS* v. *Chadha,* 462 U. S. 919 (1983), the Attorney General would have had standing to challenge the one-House veto provision because it rendered his authority provisional rather than final. By parity of reasoning, President Gerald Ford could have sued to challenge the appointment provisions of the Federal Election Campaign Act which were struck down in *Buckley* v. *Valeo,* 424 U. S. 1 (1976) *(per curiam),* and a Member of Congress could have challenged the validity of President Coolidge's pocket veto that was sustained in *The Pocket Veto Case,* 279 U. S. 655 (1929).

There would be nothing irrational about a system that granted standing in these cases; some European constitutional courts operate under one or another variant of such a regime. See, *e. g.,* Favoreu, Constitutional Review in Europe, in Constitutionalism and Rights 38, 41 (L. Henkin & A. Rosenthal eds. 1990); Wright Sheive, Central and Eastern European Constitutional Courts and the Antimajoritarian Objection to Judicial Review, 26 Law & Pol'y Int'l Bus. 1201, 1209 (1995); A. Stone, The Birth of Judicial Politics in France 232 (1992); D. Kommers, Judicial Politics in West Germany: A Study of the Federal Constitutional Court 106 (1976). But it is obviously not the regime that has obtained under our Constitution to date. Our regime contemplates a more restricted role for Article III courts, well expressed by Justice Powell in his concurring opinion in *United States* v. *Richardson,* 418 U. S. 166 (1974):

> "The irreplaceable value of the power articulated by Mr. Chief Justice Marshall [in *Marbury* v. *Madison,* 1 Cranch 137 (1803),] lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests." *Id.,* at 192.

IV

In sum, appellees have alleged no injury to themselves as individuals (contra, *Powell*), the institutional injury they allege is wholly abstract and widely dispersed (contra, *Coleman*), and their attempt to litigate this dispute at this time and in this form is contrary to historical experience. We attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit.[10] See n. 2, *supra.* We also note that our conclusion neither deprives Members of Congress of an adequate remedy (since they may repeal the Act or exempt appropriations bills from its reach), nor forecloses the Act from constitutional challenge (by someone who suffers judicially cognizable injury as a result of the Act). Whether the case would be different if any of these circumstances were different we need not now decide.

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[10] Cf. *Bender,* 475 U. S., at 544 ("Generally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take"); *United States* v. *Ballin,* 144 U. S. 1, 7 (1892) ("The two houses of Congress are legislative bodies representing larger constituencies. Power is not vested in any one individual, but in the aggregate of the members who compose the body, and its action is not the action of any separate member or number of members, but the action of the body as a whole").

We therefore hold that these individual members of Congress do not have a sufficient "personal stake" in this dispute and have not alleged a sufficiently concrete injury to have established Article III standing.[11] The judgment of the District Court is vacated, and the case is remanded with instructions to dismiss the complaint for lack of jurisdiction.

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, concurring in the judgment.

Appellees claim that the Line Item Veto Act, Pub. L. 104–130, 110 Stat. 1200, codified at 2 U. S. C. § 691 *et seq.* (1994 ed., Supp. II), is unconstitutional because it grants the President power, which Article I vests in Congress, to repeal a provision of federal law. As JUSTICE STEVENS points out, appellees essentially claim that, by granting the President power to repeal statutes, the Act injures them by depriving them of their official role in voting on the provisions that become law. See *post,* at 836–837. Under our precedents, it is fairly debatable whether this injury is sufficiently "personal" and "concrete" to satisfy the requirements of Article III.[1]

There is, first, difficulty in applying the rule that an injury on which standing is predicated be personal, not official. If our standing doctrine recognized this as a distinction with a dispositive effect, the injury claimed would not qualify: the Court is certainly right in concluding that appellees sue not in personal capacities, but as holders of seats in the Congress. See *ante,* at 821. And yet the significance of this distinction is not so straightforward. In *Braxton County Court* v. *West Virginia ex rel. State Tax Comm'rs,* 208 U. S. 192 (1908), it is true, we dismissed a challenge by a county court to a state tax law for lack of jurisdiction, broadly stating that " 'the interest of a [party seeking relief] in this court should be a personal and not an official interest,' " *id.,* at 198 (quoting *Smith* v. *Indiana,* 191 U. S. 138, 149 (1903)); accord, *Joint Anti-Fascist Refugee Comm.* v. *McGrath,* 341 U. S. 123, 151 (1951) (Frankfurter, J., concurring). But the Court found *Braxton County* "inapplicable" to a challenge by a group of state legislators in *Coleman* v. *Miller,* 307 U. S. 433, 438, and n. 3 (1939), and found the legislators had standing even though they claimed no injury but a deprivation of official voting power, *id.,* at 437–446.[2] Thus, it is at least arguable that the official nature of the harm here does not preclude standing.

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[11] In addition, it is far from clear that this injury is "fairly traceable" to appellants, as our precedents require, since the alleged cause of appellees' injury is not appellants' exercise of legislative power but the actions of their own colleagues in Congress in passing the Act. Cf. *Holtzman* v. *Schlesinger,* 484 F. 2d 1307, 1315 (CA2 1973) ("Representative Holtzman . . . has not been denied any right to vote on [the war in Cambodia] by any action of the defendants [Executive Branch officials]. . . . The fact that her vote was ineffective was due to the contrary votes of her colleagues and not the defendants herein").

[1] While Congress may, by authorizing suit for particular parties, remove any prudential standing barriers, as it has in this case, see *ante,* at 820, n. 3, it may not reduce the Article III minimums.

Nor is appellees' injury so general that, under our case law, they clearly cannot satisfy the requirement of concreteness. On the one hand, appellees are not simply claiming harm to their interest in having government abide by the Constitution, which would be shared to the same extent by the public at large and thus provide no basis for suit, see, *e. g., Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 482–483 (1982); *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U. S. 208, 217, 220 (1974); *Fairchild* v. *Hughes*, 258 U. S. 126, 129–130 (1922). Instead, appellees allege that the Act deprives them of an element of their legislative power; as a factual matter they have a more direct and tangible interest in the preservation of that power than the general citizenry has. Cf. *Coleman, supra*, at 438 (concluding that state legislators had a "plain" and "direct" interest in the effectiveness of their votes); see also *Hendrick* v. *Walters*, 865 P. 2d 1232, 1236–1238 (Okla. 1993) (concluding that a legislator had a personal interest in a suit to determine whether the Governor had lawfully assumed office due to substantial interaction between the Governor and legislature); *Colorado General Assembly* v. *Lamm*, 704 P. 2d 1371, 1376–1378 (Colo. 1985) (concluding that the legislature had suffered an injury in fact as a result of the Governor's exercise of his line item veto power). On the other hand, the alleged, continuing deprivation of federal legislative power is not as specific or limited as the nullification of the decisive votes of a group of legislators in connection with a specific item of legislative consideration in *Coleman*, being instead shared by all the members of the official class who could suffer that injury, the Members of Congress.[3]

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[2] As appellants note, it is also possible that the impairment of certain official powers may support standing for Congress, or one House thereof, to seek the aid of the Federal Judiciary. See Brief for Appellants 26, n. 14 (citing *McGrain* v. *Daugherty,* 273 U. S. 135, 174 (1927)). And, as appellants concede, see Brief for Appellants 20–21, 25–28, an injury to official authority may support standing for a government itself or its duly authorized agents, see, *e. g., Diamond* v. *Charles,* 476 U. S. 54, 62 (1986) (noting that "a State has standing to defend the constitutionality of its statute" in federal court); *ICC* v. *Oregon-Washington R. & Nav. Co.,* 288 U. S. 14, 25–27 (1933) (explaining that a federal agency had standing to appeal, because an official or an agency could be designated to defend the interests of the Federal Government in federal court); *Coleman* v. *Miller,* 307 U. S. 433, 441–445 (1939) (discussing cases).

Because it is fairly debatable whether appellees' injury is sufficiently personal and concrete to give them standing, it behooves us to resolve the question under more general

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[3] As the Court explains, *Coleman* may well be distinguishable on the further ground that it involved a suit by state legislators that did not implicate either the separation-of-powers concerns raised in this case or corresponding federalism concerns (since the Kansas Supreme Court had exercised jurisdiction to decide a federal issue). See *ante*, at 824–825, n. 8.

separation-of-powers principles underlying our standing requirements. See *Allen* v. *Wright*, 468 U. S. 737, 752 (1984); *United States* v. *Richardson*, 418 U. S. 166, 188–197 (1974) (Powell, J., concurring). While "our constitutional structure [does not] requir[e] . . . that the Judicial Branch shrink from a confrontation with the other two coequal branches," *Valley Forge Christian College*, 454 U. S., at 474, we have cautioned that respect for the separation of powers requires the Judicial Branch to exercise restraint in deciding constitutional issues by resolving those implicating the powers of the three branches of Government as a "last resort," see *ibid.* The counsel of restraint in this case begins with the fact that a dispute involving only officials, and the official interests of those, who serve in the branches of the National Government lies far from the model of the traditional common-law cause of action at the conceptual core of the case-or-controversy requirement, see *Joint Anti-Fascist Refugee Comm.*, *supra*, at 150, 152 (Frankfurter, J., concurring). Although the contest here is not formally between the political branches (since Congress passed the bill augmenting Presidential power and the President signed it), it is in substance an interbranch controversy about calibrating the legislative and executive powers, as well as an intrabranch dispute between segments of Congress itself. Intervention in such a controversy would risk damaging the public confidence that is vital to the functioning of the Judicial Branch, cf. *Valley Forge Christian College*, *supra*, at 474 (quoting *Richardson*, *supra*, at 188 (Powell, J., concurring)), by embroiling the federal courts in a power contest nearly at the height of its political tension.

While it is true that a suit challenging the constitutionality of this Act brought by a party from outside the Federal Government would also involve the Court in resolving the dispute over the allocation of power between the political branches, it would expose the Judicial Branch to a lesser risk. Deciding a suit to vindicate an interest outside the

Government raises no specter of judicial readiness to enlist on one side of a political tug-of-war, since "the propriety of such action by a federal court has been recognized since *Marbury* v. *Madison*, 1 Cranch 137 (1803)." *Valley Forge Christian College*, *supra*, at 473–474. And just as the presence of a party beyond the Government places the Judiciary at some remove from the political forces, the need to await injury to such a plaintiff allows the courts some greater separation in the time between the political resolution and the judicial review.

> "[B]y connecting the censureship of the laws with the private interests of members of the community, . . . the legislation is protected from wanton assailants, and from the daily aggressions of party-spirit." 1 A. de Tocqueville, Democracy in America 105 (Schoken ed. 1961).

The virtue of waiting for a private suit is only confirmed by the certainty that another suit can come to us. The parties agree, and I see no reason to question, that if the President "cancels" a conventional spending or tax provision pursuant to the Act, the putative beneficiaries of that provision will likely suffer a cognizable injury and thereby have standing under Article III. See Brief for Appellants 19–20, and n. 10; Brief for Appellees 32–33. By depriving beneficiaries of the money to which they would otherwise be entitled, a cancellation would produce an injury that is "actual," "personal and individual," and involve harm to a "legally protected interest," *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560, and n. 1 (1992) (internal quotation marks omitted); assuming the canceled provision would not apply equally to the entire public, the injury would be "concrete," *id.*, at 560, 573–574; and it would be "fairly trace[able] to the challenged action of the" executive officials involved in the cancellation, *id.*, at 560 (internal quotation marks omitted), as well as probably "redress[able] by a favorable decision," *id.*, at 561 (internal quotation marks and citation omitted). See, *e. g.*, *Train* v. *City of New York,* 420 U. S. 35, 40 (1975) (suit by City of New York seeking proper allotment of federal funds). While the Court has declined to lower standing requirements simply because no one would otherwise be able to litigate a claim, see *Valley Forge Christian College, supra,* at 489; *Schlesinger,* 418 U. S., at 227; *United States* v. *Richardson, supra,* at 179, the certainty of a plaintiff who obviously would have standing to bring a suit to court after the politics had at least subsided from a full boil is a good reason to resolve doubts about standing against the plaintiff invoking an official interest, cf. *Joint Anti-Fascist Refugee Comm.,* 341 U. S., at 153–154 (Frankfurter, J., concurring) (explaining that the availability of another person to bring suit may affect the standing calculus).

I therefore conclude that appellees' alleged injuries are insufficiently personal and concrete to satisfy Article III standing requirements of personal and concrete harm. Since this would be so in any suit under the conditions here, I accordingly find no cognizable injury to appellees.

JUSTICE STEVENS, dissenting.

The Line Item Veto Act purports to establish a procedure for the creation of laws that are truncated versions of bills that have been passed by the Congress and presented to the President for signature. If the procedure is valid, it will deny every Senator and every Representative any opportunity to vote for or against the truncated measure that survives the exercise of the President's cancellation authority. Because the opportunity to cast such votes is a right guaranteed by the text of the Constitution, I think it clear that the persons who are deprived of that right by the Act have standing to challenge its constitutionality. Moreover, because the impairment of that constitutional right has an immediate impact on their official powers, in my judgment they need not wait until after the President has exercised his cancellation authority to bring suit. Finally, the same reason that the appellees have standing provides a sufficient basis for concluding that the statute is unconstitutional.

Article I, § 7, of the Constitution provides that every Senator and every Representative has the power to vote on "Every Bill . . . before it become a law" either as a result of its having been signed by the President or as a result of its "Reconsideration" in the light of the President's "Objections."[1] In contrast, the Line Item Veto Act establishes a mechanism by which bills passed by both Houses of Congress will eventually produce laws that have not passed either House of Congress and that have not been voted on by any Senator or Representative.

Assuming for the moment that this procedure is constitutionally permissible, and that the President will from time to time exercise the power to cancel portions of a just-enacted law, it follows that the statute deprives every Senator and every Representative of the right to vote for or against measures that may become law. The appellees cast their challenge to the constitutionality of the Act in a slightly different way. Their complaint asserted that the Act "alter[s] the legal and practical effect of all votes they may cast on bills containing such separately vetoable items" and "divest[s] the[m] of their constitutional role in the repeal of legislation." Complaint ¶ 14. These two claimed injuries are at base the same as the injury on which I rest my analysis. The reason the complaint frames the issues in the way that it does is related to the Act's technical operation. Under the Act, the President would receive and sign a bill exactly as it passed both Houses, and would exercise his partial veto power only *after* the law had been enacted. See 2 U. S. C. § 691(a) (1994 ed., Supp. II). The appellees thus articulated their claim as a combination of the diminished effect of their initial vote and the circumvention of their right to participate in the subsequent repeal. Whether one looks at the claim from this perspective, or as a simple denial of their right to vote on the precise text that will ultimately become law, the basic nature of the injury caused by the Act is the same.

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[1] The full text of the relevant paragraph of § 7 provides:

"Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law." U. S. Const., Art. I, § 7.

In my judgment, the deprivation of this right—essential to the legislator's office—constitutes a sufficient injury to provide every Member of Congress with standing to challenge the constitutionality of the statute. If the dilution of an individual voter's power to elect representatives provides that voter with standing—as it surely does, see, *e. g., Baker* v. *Carr,* 369 U. S. 186, 204–208 (1962)—the deprivation of the right possessed by each Senator and Representative to vote for or against the precise text of any bill before it becomes law must also be a sufficient injury to create Article III standing for them.[2] Although, as JUSTICE BREYER demonstrates, see *post,* at 840–843 (dissenting opinion), the majority's attempt to distinguish *Coleman* v. *Miller,* 307 U. S. 433, 438 (1939), is not persuasive, I need not rely on that case to support my view that the Members of Congress have standing to sue in this instance. In *Coleman*, the legislators complained that their votes were denied full effectiveness. See *ibid.;* see also *Dyer* v. *Blair*, 390 F. Supp. 1291, 1297, n. 12 (ND Ill. 1975). But the law at issue here does not simply alter the effect of the legislators' votes; it denies them any opportunity at all to cast votes for or against the truncated versions of the bills presented to the President.[3]

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[2] The appellees' assertion of their right to vote on legislation is not simply a generalized interest in the proper administration of government, cf. *Allen* v. *Wright,* 468 U. S. 737, 754 (1984), and the legislators' personal interest in the ability to exercise their constitutionally ensured power to vote on laws is certainly distinct from the interest that an individual citizen challenging the Act might assert.

Moreover, the appellees convincingly explain how the immediate, constant threat of the partial veto power has a palpable effect on their current legislative choices. See Brief for Appellees 23–25, 29–31. Because the Act has this immediate and important impact on the powers of Members of Congress, and on the manner in which they undertake their legislative responsibilities, they need not await an exercise of the President's cancellation authority to institute the litigation that the statute itself authorizes. See 2 U. S. C. § 692(a)(1) (1994 ed., Supp. II).

Given the fact that the authority at stake is granted by the plain and unambiguous text of Article I, it is equally clear to me that the statutory attempt to eliminate it is invalid.

Accordingly, I would affirm the judgment of the District Court.

JUSTICE BREYER, dissenting.

As the majority points out, Congress has enacted a specific statute (signed by the President) granting the plaintiffs authority to bring this case. *Ante*, at 815–816, citing 2 U. S. C.

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[3] The majority's reference to the absence of any similar suit in earlier disputes between Congress and the President, see *ante*, at 826–828, does not strike me as particularly relevant. First, the fact that others did not choose to bring suit does not necessarily mean the Constitution would have precluded them from doing so. Second, because Congress did not authorize declaratory judgment actions until the federal Declaratory Judgment Act of 1934, 48 Stat. 955, the fact that President Johnson did not bring such an action in 1868 is not entirely surprising.

§ 692(a)(1) (1994 ed., Supp. II). That statutory authorization "eliminates any prudential standing limitations and significantly lessens the risk of unwanted conflict with the Legislative Branch." *Ante,* at 820, n. 3. Congress, however, cannot grant the federal courts more power than the Constitution itself authorizes us to exercise. Cf. *Hayburn's Case,* 2 Dall. 409 (1792). Thus, we can proceed to the merits only if the "judicial Power" of the United States—"extend[ing] to . . . Cases, in Law and Equity" and to "Controversies"—covers the dispute before us. U. S. Const., Art. III, § 2.

I concede that there would be no case or controversy here were the dispute before us not truly adversary, or were it not concrete and focused. But the interests that the parties assert are genuine and opposing, and the parties are therefore truly adverse. Cf. *Chicago & Grand Trunk R. Co.* v. *Wellman,* 143 U. S. 339 (1892). Moreover, as JUSTICE STEVENS points out, the harm that the plaintiffs suffer (on their view of the law) consists in part of the systematic abandonment of laws for which a majority voted, in part of the creation of other laws in violation of procedural rights which (they say) the Constitution provides them, and in part of the consequent and immediate impediment to their ability to do the job that the Constitution requires them to do. See *ante,* at 835–837, 838 (dissenting opinion); Complaint ¶ 14; App. 34–36, 39–40, 42–46, 54–55, 57–59, 62–64. Since federal courts might well adjudicate cases involving comparable harms in other contexts (such as purely private contexts), the harm at issue is sufficiently concrete. Cf., *e. g., Bennett* v. *Spear,* 520 U. S. 154, 167–174 (1997); *Northeastern Fla. Chapter, Associated Gen. Contractors of America* v. *Jacksonville,* 508 U. S. 656 (1993). See also *ante,* at 831–832 (SOUTER, J., concurring in judgment). The harm is focused and the accompanying legal issues are both focused and of the sort that this Court is used to deciding. See, *e. g., United States* v. *Munoz-Flores,* 495 U. S. 385, 392–396 (1990). The plaintiffs therefore do not ask the Court "to pass upon" an "abstract, intellectual proble[m]," but to determine "a concrete, living contest between" genuine "adversaries." *Coleman* v. *Miller*, 307 U. S. 433, 460 (1939) (Frankfurter, J., dissenting).

Nonetheless, there remains a serious constitutional difficulty due to the fact that this dispute about lawmaking procedures arises between Government officials and is brought by legislators. The critical question is whether or not this dispute, for that reason, is so different in form from those "matters that were the traditional concern of the courts at Westminster" that it falls outside the scope of Article III's judicial power. *Ibid.* Justice Frankfurter explained this argument in his dissent in *Coleman*, saying that courts traditionally

> "leave intra-parliamentary controversies to parliaments and outside the scrutiny of law courts. The procedures for voting in legislative assemblies—who are members, how and when they should vote, what is the requisite number of votes for different phases of legislative activity, what votes were cast and how they were counted—surely are matters that not merely concern political action, but are of the very essence of political action, if 'political' has any connotation at all. . . . In no sense are they matters of 'private damage.' They pertain to legislators not as individuals but as political representatives executing the legislative process. To open the law courts to such controversies is to have courts sit in judgment on the manifold disputes engendered by procedures for voting in legislative assemblies." *Id.*, at 469–470.

Justice Frankfurter dissented because, in his view, the "political" nature of the case, which involved legislators, placed the dispute outside the scope of Article III's "case" or "controversy" requirement. Nonetheless, the *Coleman* court rejected his argument.

Although the majority today attempts to distinguish *Coleman, ante,* at 821–826, I do not believe that Justice Frankfurter's argument or variations on its theme can carry the day here. First, as previously mentioned, the jurisdictional statute before us eliminates all but constitutional considerations, and the circumstances mentioned above remove all but the "political" or "intragovernmental" aspect of the constitutional issue. *Supra,* at 838–839.

Second, the Constitution does not draw an absolute line between disputes involving a "personal" harm and those involving an "official" harm." Cf. *ante,* at 818, 821. See *ante,* at 831, n. 2 (SOUTER, J., concurring in judgment). Justice Frankfurter himself said that this Court had heard cases involving injuries suffered by state officials in their official capacities. *Coleman, supra,* at 466 (citing *Blodgett* v. *Silberman,* 277 U. S. 1 (1928), and *Boynton* v. *Hutchinson,* 291 U. S. 656, cert. dism'd on other grounds, 292 U. S. 601 (1934)). See also, *e. g., Will* v. *Calvert Fire Ins. Co.,* 437 U. S. 655, 661 (1978) (Federal District Judge appealing mandamus issued against him in respect to a docketkeeping matter); *Board of Ed. of Central School Dist. No. 1* v. *Allen,* 392 U. S. 236, 241, n. 5 (1968) (indicating that school board has standing where members must either violate oath or risk loss of school funds and expulsion from office). *Coleman* itself involved injuries in the plaintiff legislators' official capacity. And the majority in this case, suggesting that legislators might have standing to complain of rules that "denied" them "their vote . . . in a discriminatory manner," concedes at least the possibility that any constitutional rule distinguishing "official" from "personal" injury is not absolute. *Ante,* at 824, n. 7. See also *ante,* at 821.

Third, Justice Frankfurter's views were dissenting views, and the dispute before us, when compared to *Coleman,* presents a much stronger claim, not a weaker claim, for constitutional justiciability. The lawmakers in *Coleman* complained of a lawmaking procedure that, at worst, improperly counted

Kansas as having ratified one proposed constitutional amendment, which had been ratified by only 5 other States, and rejected by 26, making it unlikely that it would ever become law. *Coleman, supra,* at 436. The lawmakers in this case complain of a lawmaking procedure that threatens the validity of many laws (for example, all appropriations laws) that Congress regularly and frequently enacts. The systematic nature of the harm immediately affects the legislators' ability to do their jobs. The harms here are more serious, more pervasive, and more immediate than the harm at issue in *Coleman.* Cf. *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.,* 454 U. S. 464, 471 (1982), quoting *Chicago & Grand Trunk R. Co.* v. *Wellman,* 143 U. S., at 345 (judicial power "'is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy'").

The majority finds a difference in the fact that the validity of the legislators' votes was directly at issue in *Coleman.*

> "[O]ur holding in *Coleman* stands . . . for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." *Ante,* at 823.

But since many of the present plaintiffs will likely vote in the majority for at least some appropriations bills that are then subject to Presidential cancellation, I think that—on their view of the law—their votes are threatened with nullification too. Cf. *ante,* at 823, n. 6, 825.

The majority also suggests various distinctions arising out of the fact that *Coleman* involved a state legislature, rather than the federal Congress. *Ante,* at 824–825, n. 8. See also *ante,* at 832, n. 3 (SOUTER, J., concurring in judgment). But Justice Frankfurter treated comparable arguments as irrelevant, and the *Coleman* majority did not disagree. *Coleman,* 307 U. S., at 462, 465–466, and n. 6 (Frankfurter, J., dissenting); *id.*, at 446. While I recognize the existence of potential differences between state and federal legislators, I do not believe that those differences would be determinative here, where constitutional, not prudential, considerations are at issue, particularly given the Constitution's somewhat comparable concerns for state authority and the presence here of a federal statute (signed by the President) specifically authorizing this lawsuit. Cf. *ante*, at 833 (SOUTER, J., concurring in judgment). And in light of the immediacy of the harm, I do not think that the possibility of a later challenge by a private plaintiff, see *ante*, at 834–835 (SOUTER, J., concurring in judgment), could be constitutionally determinative. Finally, I do not believe that the majority's historical examples primarily involving the Executive Branch and involving lawsuits that were *not* brought, *ante*, at 826–828, are legally determinative. See *ante*, at 838, n. 3 (STEVENS, J., dissenting).

In sum, I do not believe that the Court can find this case nonjusticiable without overruling *Coleman*. Since it does not do so, I need not decide whether the systematic nature, seriousness, and immediacy of the harm would make this dispute constitutionally justiciable even in *Coleman*'s absence. Rather, I can and would find this case justiciable on *Coleman*'s authority. I add that because the majority has decided that this dispute is not now justiciable and has expressed no view on the merits of the appeal, I shall not discuss the merits either, but reserve them for future argument.

RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. *v.* AMERICAN CIVIL LIBERTIES UNION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 96–511. Argued March 19, 1997—Decided June 26, 1997

Two provisions of the Communications Decency Act of 1996 (CDA or Act) seek to protect minors from harmful material on the Internet, an international network of interconnected computers that enables millions of people to communicate with one another in "cyberspace" and to access vast amounts of information from around the world. Title 47 U. S. C. § 223(a)(1)(B)(ii) (1994 ed., Supp. II) criminalizes the "knowing" transmission of "obscene or indecent" messages to any recipient under 18 years of age. Section 223(d) prohibits the "knowin[g]" sending or displaying to a person under 18 of any message "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." Affirmative defenses are provided for those who take "good faith, . . . effective . . . actions" to restrict access by minors to the prohibited communications, § 223(e)(5)(A), and those who restrict such access by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number, § 223(e)(5)(B). A number of plaintiffs filed suit challenging the constitutionality of §§ 223(a)(1) and 223(d). After making extensive findings of fact, a three-judge District Court convened pursuant to the Act entered a preliminary injunction against enforcement of both challenged provisions. The court's judgment enjoins the Government from enforcing § 223(a)(1)(B)'s prohibitions insofar as they relate to "indecent" communications, but expressly preserves the Government's right to investigate and prosecute the obscenity or child pornography activities prohibited therein. The injunction against enforcement of § 223(d) is unqualified because that section contains no separate reference to obscenity or child pornography. The Government appealed to this Court under the Act's special review provisions, arguing that the District Court erred in holding that the CDA violated both the First Amendment because it is overbroad and the Fifth Amendment because it is vague.

Held: The CDA's "indecent transmission" and "patently offensive display" provisions abridge "the freedom of speech" protected by the First Amendment. Pp. 864–885.

(a) Although the CDA's vagueness is relevant to the First Amendment overbreadth inquiry, the judgment should be affirmed without reaching the Fifth Amendment issue. P. 864.

(b) A close look at the precedents relied on by the Government—*Ginsberg* v. *New York*, 390 U. S. 629; *FCC* v. *Pacifica Foundation*, 438 U. S. 726; and *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41—raises, rather than relieves, doubts about the CDA's constitutionality. The CDA differs from the various laws and orders upheld in those cases in many ways, including that it does not allow parents to consent to their children's use of restricted materials; is not limited to commercial transactions; fails to provide any definition of "indecent" and omits any requirement that "patently offensive" material lack socially redeeming value; neither limits its broad categorical prohibitions to particular times nor bases them on an evaluation by an agency familiar with the medium's unique characteristics; is punitive; applies to a medium that, unlike radio, receives full First Amendment protection; and cannot be properly analyzed as a form of time, place, and manner regulation because it is a content-based blanket restriction on speech. These precedents, then, do not require the Court to uphold the CDA and are fully consistent with the application of the most stringent review of its provisions. Pp. 864–868.

(c) The special factors recognized in some of the Court's cases as justifying regulation of the broadcast media—the history of extensive Government regulation of broadcasting, see, *e. g.*, *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 399–400; the scarcity of available frequencies at its inception, see, *e. g.*, *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 637–638; and its "invasive" nature, see *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 128—are not present in cyberspace. Thus, these cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to the Internet. Pp. 868–870.

(d) Regardless of whether the CDA is so vague that it violates the Fifth Amendment, the many ambiguities concerning the scope of its coverage render it problematic for First Amendment purposes. For instance, its use of the undefined terms "indecent" and "patently offensive" will provoke uncertainty among speakers about how the two standards relate to each other and just what they mean. The vagueness of such a content-based regulation, see, *e. g.*, *Gentile* v. *State Bar of Nev.*, 501 U. S. 1030, coupled with its increased deterrent effect as a criminal statute, see, *e. g.*, *Dombrowski* v. *Pfister*, 380 U. S. 479, raise special First Amendment concerns because of its obvious chilling effect on free speech. Contrary to the Government's argument, the CDA is not saved from vagueness by the fact that its "patently offensive" standard repeats the second part of the three-prong obscenity test set forth in *Miller* v. *California,* 413 U. S. 15, 24. The second *Miller* prong reduces the inherent vagueness of its own "patently offensive" term by requiring that the proscribed material be "specifically defined by the applicable state law." In addition, the *Miller* definition applies only to "sexual conduct," whereas the CDA prohibition extends also to "excretory activities" and "organs" of both a sexual and excretory nature. Each of *Miller*'s other two prongs also critically limits the uncertain sweep of the obscenity definition. Just because a definition including three limitations is not vague, it does not follow that one of those limitations, standing alone, is not vague. The CDA's vagueness undermines the likelihood that it has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials. Pp. 870–874.

(e) The CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. Although the Government has an interest in protecting children from potentially harmful materials, see, *e. g., Ginsberg,* 390 U. S., at 639, the CDA pursues that interest by suppressing a large amount of speech that adults have a constitutional right to send and receive, see, *e. g., Sable,* 492 U. S., at 126. Its breadth is wholly unprecedented. The CDA's burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the Act's legitimate purposes. See, *e. g., id.,* at 126. The Government has not proved otherwise. On the other hand, the District Court found that currently available *user-based* software suggests that a reasonably effective method by which *parents* can prevent their children from accessing material which the *parents* believe is inappropriate will soon be widely available. Moreover, the arguments in this Court referred to possible alternatives such as requiring that indecent material be "tagged" to facilitate parental control, making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet differently from others. Particularly in the light of the absence of any detailed congressional findings, or even hearings addressing the CDA's special problems, the Court is persuaded that the CDA is not narrowly tailored. Pp. 874–879.

(f) The Government's three additional arguments for sustaining the CDA's affirmative prohibitions are rejected. First, the contention that the Act is constitutional because it leaves open ample "alternative channels" of communication is unpersuasive because the CDA regulates speech on the basis of its content, so that a "time, place, and manner" analysis is inapplicable. See, *e. g., Consolidated Edison Co. of N. Y.* v.

Public Serv. Comm'n of N. Y., 447 U. S. 530, 536. Second, the assertion that the CDA's "knowledge" and "specific person" requirements significantly restrict its permissible application to communications to persons the sender knows to be under 18 is untenable, given that most Internet forums are open to all comers and that even the strongest reading of the "specific person" requirement would confer broad powers of censorship, in the form of a "heckler's veto," upon any opponent of indecent speech. Finally, there is no textual support for the submission that material having scientific, educational, or other redeeming social value will necessarily fall outside the CDA's prohibitions. Pp. 879–881.

(g) The § 223(e)(5) defenses do not constitute the sort of "narrow tailoring" that would save the CDA. The Government's argument that transmitters may take protective "good faith actio[n]" by "tagging" their indecent communications in a way that would indicate their contents, thus permitting recipients to block their reception with appropriate software, is illusory, given the requirement that such action be "effective": The proposed screening software does not currently exist, but, even if it did, there would be no way of knowing whether a potential recipient would actually block the encoded material. The Government also failed to prove that § 223(b)(5)'s verification defense would significantly reduce the CDA's heavy burden on adult speech. Although such verification is actually being used by some commercial providers of sexually explicit material, the District Court's findings indicate that it is not economically feasible for most noncommercial speakers. Pp. 881–882.

(h) The Government's argument that this Court should preserve the CDA's constitutionality by honoring its severability clause, § 608, and by construing nonseverable terms narrowly, is acceptable in only one respect. Because obscene speech may be banned totally, see *Miller*, 413 U. S., at 18, and § 223(a)'s restriction of "obscene" material enjoys a textual manifestation separate from that for "indecent" material, the Court can sever the term "or indecent" from the statute, leaving the rest of § 223(a) standing. Pp. 882–885.

(i) The Government's argument that its "significant" interest in fostering the Internet's growth provides an independent basis for upholding the CDA's constitutionality is singularly unpersuasive. The dramatic expansion of this new forum contradicts the factual basis underlying this contention: that the unregulated availability of "indecent" and "patently offensive" material is driving people away from the Internet. P. 885.

929 F. Supp. 824, affirmed.

STEVENS, J., delivered the opinion of the Court, in which SCALIA, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment in part and dissenting in part, in which REHNQUIST, C. J., joined, *post*, p. 886.

Deputy Solicitor General Waxman argued the cause for appellants. On the briefs were *Acting Solicitor General Dellinger, Assistant Attorney General Hunger, Deputy Solicitor General Kneedler, Irving L. Gornstein, Barbara L. Herwig*, and *Jacob M. Lewis.*

Bruce J. Ennis, Jr., argued the cause for appellees. With him on the brief for appellees American Library Association et al. were *Ann M. Kappler, Paul M. Smith, Donald B. Verrilli, Jr., John B. Morris, Jr., Jill Lesser, Richard M. Schmidt, Jr., Bruce Rich, James Wheaton, Jerry Berman, Elliot M. Mincberg, Lawrence S. Ottinger, Andrew J. Schwartzman, Ronald L. Plesser, James J. Halpert, Michael Traynor, Robert P. Taylor, Rene Milam, Marc Jacobson, Bruce W. Sanford*, and *Henry S. Hoberman. Christopher A. Hansen, Steven R. Shapiro, Marjorie Heins, Catherine Weiss, Stefan Presser, David L. Sobel, Marc Rotenberg*, and *Roger Evans* filed a brief for appellees American Civil Liberties Union Foundation et al.*

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*Briefs of *amici curiae* urging reversal were filed for Member of Congress Dan Coats et al. by *Bruce A. Taylor* and *Cathleen A. Cleaver;* for Enough is Enough et al. by *Ronald D. Maines;* for the Family Life Project of the American Center for Law and Justice by *Jay Alan Sekulow, James M. Henderson, Sr., Colby M. May, Keith A. Fournier, John G. Stepanovich*, and *Thomas P. Monaghan;* for Morality in Media, Inc., by *Paul J. McGeady* and *Robert W. Peters;* and for James J. Clancy by *Mr. Clancy, pro se*, and *Carol A. Clancy.*

Briefs of *amici curiae* urging affirmance were filed for the American Association of University Professors et al. by *James D. Crawford, Carl A. Solano, Theresa E. Loscalzo, Jennifer DuFault James*, and *Joseph T. Lukens;* for Apollomedia Corporation et al. by *William Bennett Turner;* for the Association of National Advertisers, Inc., by *P. Cameron DeVore, John J. Walsh, Steven G. Brody, Mary Elizabeth Taylor, Gilbert H. Weil*, and *Sol Schildhause;* for the Chamber of Commerce of the United States by *Clifford M. Sloan, Bert W. Rein, Robert J. Butler, Stephen A. Bokat*, and

JUSTICE STEVENS delivered the opinion of the Court.

At issue is the constitutionality of two statutory provisions enacted to protect minors from "indecent" and "patently offensive" communications on the Internet. Notwithstanding the legitimacy and importance of the congressional goal of protecting children from harmful materials, we agree with the three-judge District Court that the statute abridges "the freedom of speech" protected by the First Amendment.[1]

I

The District Court made extensive findings of fact, most of which were based on a detailed stipulation prepared by the parties. See 929 F. Supp. 824, 830–849 (ED Pa. 1996).[2] The findings describe the character and the dimensions of the Internet, the availability of sexually explicit material in that medium, and the problems confronting age verification for recipients of Internet communications. Because those findings provide the underpinnings for the legal issues, we begin with a summary of the undisputed facts.

The Internet

The Internet is an international network of interconnected computers. It is the outgrowth of what began in 1969 as a

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Robin S. Conrad; for Feminists for Free Expression by *Barbara McDowell;* for the National Association of Broadcasters et al. by *Floyd Abrams, Jack N. Goodman,* and *Susanna M. Lowy;* for Playboy Enterprises, Inc., by *Robert Corn-Revere* and *Burton Joseph;* for the Reporters Committee for Freedom of the Press et al. by *Jane E. Kirtley* and *S. Mark Goodman;* for Site Specific, Inc., et al. by *Jamie B. W. Stecher;* and for Volunteer Lawyers for the Arts et al. by *Daniel H. Weiner.*

Raphael Winick filed a brief of *amicus curiae* for the Speech Communication Association.

[1] "Congress shall make no law . . . abridging the freedom of speech." U. S. Const., Amdt. 1.

[2] The Court made 410 findings, including 356 paragraphs of the parties' stipulation and 54 findings based on evidence received in open court. See 929 F. Supp., at 830, n. 9, 842, n. 15.

military program called "ARPANET,"[3] which was designed to enable computers operated by the military, defense contractors, and universities conducting defense-related research to communicate with one another by redundant channels even if some portions of the network were damaged in a war. While the ARPANET no longer exists, it provided an example for the development of a number of civilian networks that, eventually linking with each other, now enable tens of millions of people to communicate with one another and to access vast amounts of information from around the world. The Internet is "a unique and wholly new medium of worldwide human communication."[4]

The Internet has experienced "extraordinary growth."[5] The number of "host" computers—those that store information and relay communications—increased from about 300 in 1981 to approximately 9,400,000 by the time of the trial in 1996. Roughly 60% of these hosts are located in the United States. About 40 million people used the Internet at the time of trial, a number that is expected to mushroom to 200 million by 1999.

Individuals can obtain access to the Internet from many different sources, generally hosts themselves or entities with a host affiliation. Most colleges and universities provide access for their students and faculty; many corporations provide their employees with access through an office network; many communities and local libraries provide free access; and an increasing number of storefront "computer coffee shops" provide access for a small hourly fee. Several major national "online services" such as America Online, CompuServe, the Microsoft Network, and Prodigy offer access to their own extensive proprietary networks as well as a link to the much larger resources of the Internet. These commercial online services had almost 12 million individual subscribers at the time of trial.

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[3] An acronym for the network developed by the Advanced Research Project Agency.

[4] *Id.*, at 844 (finding 81).

[5] *Id.*, at 831 (finding 3).

Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categorize precisely. But, as presently constituted, those most relevant to this case are electronic mail (e-mail), automatic mailing list services ("mail exploders," sometimes referred to as "listservs"), "newsgroups," "chat rooms," and the "World Wide Web." All of these methods can be used to transmit text; most can transmit sound, pictures, and moving video images. Taken together, these tools constitute a unique medium—known to its users as "cyberspace"—located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.

E-mail enables an individual to send an electronic message—generally akin to a note or letter—to another individual or to a group of addressees. The message is generally stored electronically, sometimes waiting for the recipient to check her "mailbox" and sometimes making its receipt known through some type of prompt. A mail exploder is a sort of e-mail group. Subscribers can send messages to a common e-mail address, which then forwards the message to the group's other subscribers. Newsgroups also serve groups of regular participants, but these postings may be read by others as well. There are thousands of such groups, each serving to foster an exchange of information or opinion on a particular topic running the gamut from, say, the music of Wagner to Balkan politics to AIDS prevention to the Chicago Bulls. About 100,000 new messages are posted every day. In most newsgroups, postings are automatically purged at regular intervals. In addition to posting a message that can be read later, two or more individuals wishing to communicate more immediately can enter a chat room to engage in real-time dialogue—in other words, by typing messages to one another that appear almost immediately on the others' computer screens. The District Court found that at any given time "tens of thousands of users are engaging in conversations on a huge range of subjects."[6] It is "no exaggeration to conclude that the content on the Internet is as diverse as human thought."[7]

The best known category of communication over the Internet is the World Wide Web, which allows users to search for and retrieve information stored in remote computers, as well as, in some cases, to communicate back to designated sites. In concrete terms, the Web consists of a vast number of documents stored in different computers all over the world. Some of these documents are simply files containing information. However, more elaborate documents, commonly known as Web "pages," are also prevalent. Each has its own address—"rather like a telephone number."[8] Web pages frequently contain information and sometimes allow the viewer to communicate with the page's (or "site's") author. They generally also contain "links" to other documents created by that site's author or to other (generally) related sites. Typically, the links are either blue or underlined text—sometimes images.

Navigating the Web is relatively straightforward. A user may either type the address of a known page or enter one or more keywords into a commercial "search engine" in an effort to locate sites on a subject of interest. A particular Web page may contain the information sought by the "surfer," or, through its links, it may be an avenue to other documents located anywhere on the Internet. Users generally explore a given Web page, or move to another, by clicking a computer "mouse" on one of the page's icons or links. Access to most Web pages is freely available, but some allow access only to those who have purchased the right from a commercial provider. The Web is thus comparable, from the readers' viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.

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[6] *Id.*, at 835 (finding 27).

[7] *Id.*, at 842 (finding 74).

[8] *Id.*, at 836 (finding 36).

From the publishers' point of view, it constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can "publish" information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals.[9] Publishers may either make their material available to the entire pool of Internet users, or confine access to a selected group, such as those willing to pay for the privilege. "No single organization controls any membership in the Web, nor is there any single centralized point from which individual Web sites or services can be blocked from the Web."[10]

Sexually Explicit Material

Sexually explicit material on the Internet includes text, pictures, and chat and "extends from the modestly titillating to the hardest-core."[11] These files are created, named, and posted in the same manner as material that is not sexually explicit, and may be accessed either deliberately or unintentionally during the course of an imprecise search. "Once a provider posts its content on the Internet, it cannot prevent that content from entering any community."[12] Thus, for example,

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[9] "Web publishing is simple enough that thousands of individual users and small community organizations are using the Web to publish their own personal 'home pages,' the equivalent of individualized newsletters about that person or organization, which are available to everyone on the Web." *Id.*, at 837 (finding 42).

[10] *Id.*, at 838 (finding 46).

[11] *Id.*, at 844 (finding 82).

[12] *Ibid.* (finding 86).

> "when the UCR/California Museum of Photography posts to its Web site nudes by Edward Weston and Robert Mapplethorpe to announce that its new exhibit will travel to Baltimore and New York City, those images are available not only in Los Angeles, Baltimore, and New York City, but also in Cincinnati, Mobile, or Beijing—wherever Internet users live. Similarly, the safer sex instructions that Critical Path posts to its Web site, written in street language so that the teenage receiver can understand them, are available not just in Philadelphia, but also in Provo and Prague."[13]

Some of the communications over the Internet that originate in foreign countries are also sexually explicit.[14]

Though such material is widely available, users seldom encounter such content accidentally. "A document's title or a description of the document will usually appear before the document itself . . . and in many cases the user will receive detailed information about a site's content before he or she need take the step to access the document. Almost all sexually explicit images are preceded by warnings as to the content."[15] For that reason, the "odds are slim" that a user would enter a sexually explicit site by accident.[16] Unlike communications received by radio or television, "the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial. A child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended."[17]

Systems have been developed to help parents control the material that may be available on a home computer with Internet access. A system may either limit a computer's access to an approved list of sources that have been identified as containing no adult material, it may block designated inappropriate sites, or it may attempt to block messages containing identifiable objectionable features. "Although parental control software currently can screen for certain suggestive words or for known sexually explicit sites, it cannot now screen for sexually explicit images."[18] Nevertheless, the evidence indicates that "a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be widely available."[19]

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[13] *Ibid.* (finding 85).

[14] *Id.*, at 848 (finding 117).

[15] *Id.*, at 844–845 (finding 88).

[16] *Ibid.*

[17] *Id.*, at 845 (finding 89).

Age Verification

The problem of age verification differs for different uses of the Internet. The District Court categorically determined that there "is no effective way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups or chat rooms."[20] The Government offered no evidence that there was a reliable way to screen recipients and participants in such forums for age. Moreover, even if it were technologically feasible to block minors' access to newsgroups and chat rooms containing discussions of art, politics, or other subjects that potentially elicit "indecent" or "patently offensive" contributions, it would not be possible to block their access to that material and "still allow them access to the remaining content, even if the overwhelming majority of that content was not indecent."[21]

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[18] *Id.*, at 842 (finding 72).

[19] *Ibid.* (finding 73).

[20] *Id.*, at 845 (finding 90): "An e-mail address provides no authoritative information about the addressee, who may use an e-mail 'alias' or an anonymous remailer. There is also no universal or reliable listing of e-mail addresses and corresponding names or telephone numbers, and any such listing would be or rapidly become incomplete. For these reasons, there is no reliable way in many instances for a sender to know if the e-mail recipient is an adult or a minor. The difficulty of e-mail age verification is compounded for mail exploders such as listservs, which automatically send information to all e-mail addresses on a sender's list. Government expert Dr. Olsen agreed that no current technology could give a speaker assurance that only adults were listed in a particular mail exploder's mailing list."

Technology exists by which an operator of a Web site may condition access on the verification of requested information such as a credit card number or an adult password. Credit card verification is only feasible, however, either in connection with a commercial transaction in which the card is used, or by payment to a verification agency. Using credit card possession as a surrogate for proof of age would impose costs on noncommercial Web sites that would require many of them to shut down. For that reason, at the time of the trial, credit card verification was "effectively unavailable to a substantial number of Internet content providers." 929 F. Supp., at 846 (finding 102). Moreover, the imposition of such a requirement "would completely bar adults who do not have a credit card and lack the resources to obtain one from accessing any blocked material."[22]

Commercial pornographic sites that charge their users for access have assigned them passwords as a method of age verification. The record does not contain any evidence concerning the reliability of these technologies. Even if passwords are effective for commercial purveyors of indecent material, the District Court found that an adult password requirement would impose significant burdens on noncommercial sites, both because they would discourage users from accessing their sites and because the cost of creating and maintaining such screening systems would be "beyond their reach."[23]

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[21] *Ibid.* (finding 93).

[22] *Id.*, at 846 (finding 102).

In sum, the District Court found:

> "Even if credit card verification or adult password verification were implemented, the Government presented no testimony as to how such systems could ensure that the user of the password or credit card is in fact over 18. The burdens imposed by credit card verification and adult password verification systems make them effectively unavailable to a substantial number of Internet content providers." *Ibid.* (finding 107).

II

The Telecommunications Act of 1996, Pub. L. 104–104, 110 Stat. 56, was an unusually important legislative enactment. As stated on the first of its 103 pages, its primary purpose was to reduce regulation and encourage "the rapid deployment of new telecommunications technologies." The major components of the statute have nothing to do with the Internet; they were designed to promote competition in the local telephone service market, the multichannel video market, and the market for over-the-air broadcasting. The Act includes seven Titles, six of which are the product of extensive committee hearings and the subject of discussion in Reports prepared by Committees of the Senate and the House of Representatives. By contrast, Title V—known as the "Communications Decency Act of 1996" (CDA)—contains provisions that were either added in executive committee after the hearings were concluded or as amendments offered during floor debate on the legislation. An amendment offered in the Senate was the source of the two statutory provisions challenged in this case.[24] They are informally described as the "indecent transmission" provision and the "patently offensive display" provision.[25]

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[23] *Id.*, at 847 (findings 104–106):

"At least some, if not almost all, non-commercial organizations, such as the ACLU, Stop Prisoner Rape or Critical Path AIDS Project, regard charging listeners to access their speech as contrary to their goals of making their materials available to a wide audience free of charge.

. . . . .

"There is evidence suggesting that adult users, particularly casual Web browsers, would be discouraged from retrieving information that required use of a credit card or password. Andrew Anker testified that HotWired has received many complaints from its members about HotWired's registration system, which requires only that a member supply a name, e-mail address and self-created password. There is concern by commercial content providers that age verification requirements would decrease advertising and revenue because advertisers depend on a demonstration that the sites are widely available and frequently visited."

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[24] See Exon Amendment No. 1268, 141 Cong. Rec. 15536 (1995). See also *id.*, at 15505. This amendment, as revised, became § 502 of the Telecommunications Act of 1996, 110 Stat. 133, 47 U. S. C. §§ 223(a)–(e) (1994 ed., Supp. II). Some Members of the House of Representatives opposed the Exon Amendment because they thought it "possible for our parents now to child-proof the family computer with these products available in the private sector." They also thought the Senate's approach would "involve the Federal Government spending vast sums of money trying to define elusive terms that are going to lead to a flood of legal challenges while our kids are unprotected." These Members offered an amendment intended as a substitute for the Exon Amendment, but instead enacted as an additional section of the Act entitled "Online Family Empowerment." See 110 Stat. 137, 47 U. S. C. § 230 (1994 ed., Supp. II); 141 Cong. Rec. 27881 (1995). No hearings were held on the provisions that became law. See S. Rep. No. 104–23, p. 9 (1995). After the Senate adopted the Exon Amendment, however, its Judiciary Committee did conduct a one-day hearing on "Cyberporn and Children." In his opening statement at that hearing, Senator Leahy observed:

"It really struck me in your opening statement when you mentioned, Mr. Chairman, that it is the first ever hearing, and you are absolutely right. And yet we had a major debate on the floor, passed legislation overwhelmingly on a subject involving the Internet, legislation that could dramatically change—some would say even wreak havoc—on the Internet. The Senate went in willy-nilly, passed legislation, and never once had a hearing, never once had a discussion other than an hour or so on the floor." Cyberporn and Children: The Scope of the Problem, The State of the Technology, and the Need for Congressional Action, Hearing on S. 892 before the Senate Committee on the Judiciary, 104th Cong., 1st Sess., 7–8 (1995).

The first, 47 U. S. C. § 223(a) (1994 ed., Supp. II), prohibits the knowing transmission of obscene or indecent messages to any recipient under 18 years of age. It provides in pertinent part:

> "(a) Whoever—
>
> "(1) in interstate or foreign communications—
>
> . . . . .
>
> "(B) by means of a telecommunications device knowingly—
>
> "(i) makes, creates, or solicits, and
>
> "(ii) initiates the transmission of,
>
> "any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication;
>
> . . . . .
>
> "(2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity,
>
> "shall be fined under Title 18, or imprisoned not more than two years, or both."

The second provision, § 223(d), prohibits the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age. It provides:

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[25] Although the Government and the dissent break § 223(d)(1) into two separate "patently offensive" and "display" provisions, we follow the convention of both parties below, as well as the District Court's order and opinion, in describing § 223(d)(1) as one provision.

> "(d) Whoever—
>
> "(1) in interstate or foreign communications knowingly—
>
> "(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or
>
> "(B) uses any interactive computer service to display in a manner available to a person under 18 years of age,
>
> "any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or
>
> "(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity,
>
> "shall be fined under Title 18, or imprisoned not more than two years, or both."

The breadth of these prohibitions is qualified by two affirmative defenses. See § 223(e)(5).[26] One covers those who take "good faith, reasonable, effective, and appropriate actions" to restrict access by minors to the prohibited communications. § 223(e)(5)(A). The other covers those who restrict access to covered material by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number or code. § 223(e)(5)(B).

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[26] In full, § 223(e)(5) provides:

"(5) It is a defense to a prosecution under subsection (a)(1)(B) or (d) of this section, or under subsection (a)(2) of this section with respect to the use of a facility for an activity under subsection (a)(1)(B) of this section that a person—

"(A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; or

"(B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number."

III

On February 8, 1996, immediately after the President signed the statute, 20 plaintiffs[27] filed suit against the Attorney General of the United States and the Department of Justice challenging the constitutionality of §§ 223(a)(1) and 223(d). A week later, based on his conclusion that the term "indecent" was too vague to provide the basis for a criminal prosecution, District Judge Buckwalter entered a temporary restraining order against enforcement of § 223(a)(1)(B)(ii) insofar as it applies to indecent communications. A second suit was then filed by 27 additional plaintiffs,[28] the two cases were consolidated, and a three-judge District Court was convened pursuant to § 561 of the CDA.[29] After an evidentiary hearing, that court entered a preliminary injunction against enforcement of both of the challenged provisions. Each of the three judges wrote a separate opinion, but their judgment was unanimous.

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[27] American Civil Liberties Union; Human Rights Watch; Electronic Privacy Information Center; Electronic Frontier Foundation; Journalism Education Association; Computer Professionals for Social Responsibility; National Writers Union; Clarinet Communications Corp.; Institute for Global Communications; Stop Prisoner Rape; AIDS Education Global Information System; Bibliobytes; Queer Resources Directory; Critical Path AIDS Project, Inc.; Wildcat Press, Inc.; Declan McCullagh dba Justice on Campus; Brock Meeks dba Cyberwire Dispatch; John Troyer dba The Safer Sex Page; Jonathan Wallace dba The Ethical Spectacle; and Planned Parenthood Federation of America, Inc.

[28] American Library Association; America Online, Inc.; American Booksellers Association, Inc.; American Booksellers Foundation for Free Expression; American Society of Newspaper Editors; Apple Computer, Inc.; Association of American Publishers, Inc.; Association of Publishers, Editors and Writers; Citizens Internet Empowerment Coalition; Commercial Internet Exchange Association; CompuServe Incorporated; Families Against Internet Censorship; Freedom to Read Foundation, Inc.; Health Sciences Libraries Consortium; Hotwired Ventures LLC; Interactive Digital Software Association; Interactive Services Association; Magazine Publishers of America; Microsoft Corporation; The Microsoft Network, L. L. C.; National Press Photographers Association; Netcom On-Line Communication Services, Inc.; Newspaper Association of America; Opnet, Inc.; Prodigy Services Company; Society of Professional Journalists; and Wired Ventures, Ltd.

Chief Judge Sloviter doubted the strength of the Government's interest in regulating "the vast range of online material covered or potentially covered by the CDA," but acknowledged that the interest was "compelling" with respect to some of that material. 929 F. Supp., at 853. She concluded, nonetheless, that the statute "sweeps more broadly than necessary and thereby chills the expression of adults" and that the terms "patently offensive" and "indecent" were "inherently vague." *Id.*, at 854. She also determined that the affirmative defenses were not "technologically or economically feasible for most providers," *specifically considering and rejecting an argument that providers could avoid liability by "tagging" their material in a manner that would allow potential readers to screen out unwanted transmissions. Id.*, at 856. Chief Judge Sloviter also rejected the Government's suggestion that the scope of the statute could be narrowed by construing it to apply only to commercial pornographers. *Id.*, at 854–855.

Judge Buckwalter concluded that the word "indecent" in § 223(a)(1)(B) and the terms "patently offensive" and "in context" in § 223(d)(1) were so vague that criminal enforcement of either section would violate the "fundamental constitutional principle" of "simple fairness," *id.*, at 861, and the specific protections of the First and Fifth Amendments, *id.*, at 858. He found no statutory basis for the Government's argument that the challenged provisions would be applied only to "pornographic" materials, noting that, unlike obscenity, "indecency has *not* been defined to exclude works of serious literary, artistic, political or scientific value." *Id.*, at 863.

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[29] 110 Stat. 142–143, note following 47 U. S. C. § 223 (1994 ed., Supp. II).

Moreover, the Government's claim that the work must be considered patently offensive "in context" was itself vague because the relevant context might "refer to, among other things, the nature of the communication as a whole, the time of day it was conveyed, the medium used, the identity of the speaker, or whether or not it is accompanied by appropriate warnings." *Id.*, at 864. He believed that the unique nature of the Internet aggravated the vagueness of the statute. *Id.*, at 865, n. 9.

Judge Dalzell's review of "the special attributes of Internet communication" disclosed by the evidence convinced him that the First Amendment denies Congress the power to regulate the content of protected speech on the Internet. *Id.*, at 867. His opinion explained at length why he believed the CDA would abridge significant protected speech, particularly by noncommercial speakers, while "[p]erversely, commercial pornographers would remain relatively unaffected." *Id.*, at 879. He construed our cases as requiring a "medium-specific" approach to the analysis of the regulation of mass communication, *id.*, at 873, and concluded that the Internet—as "the most participatory form of mass speech yet developed," *id.*, at 883—is entitled to "the highest protection from governmental intrusion," *ibid.*[30]

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[30] See also 929 F. Supp., at 877: "Four related characteristics of Internet communication have a transcendent importance to our shared holding that the CDA is unconstitutional on its face. We explain these characteristics in our Findings of fact above, and I only rehearse them briefly here. First, the Internet presents very low barriers to entry. Second, these barriers to entry are identical for both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. Fourth, the Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among speakers." According to Judge Dalzell, these characteristics and the rest of the District Court's findings "lead to the conclusion that Congress may not regulate indecency on the Internet at all." *Ibid.* Because appellees do not press this argument before this Court, we do not consider it. Appellees also do not dispute that the Government generally has a compelling interest in protecting minors from "indecent" and "patently offensive" speech.

The judgment of the District Court enjoins the Government from enforcing the prohibitions in § 223(a)(1)(B) insofar as they relate to "indecent" communications, but expressly preserves the Government's right to investigate and prosecute the obscenity or child pornography activities prohibited therein. The injunction against enforcement of §§ 223(d)(1) and (2) is unqualified because those provisions contain no separate reference to obscenity or child pornography.

The Government appealed under the CDA's special review provisions, § 561, 110 Stat. 142–143, and we noted probable jurisdiction, see 519 U. S. 1025 (1996). In its appeal, the Government argues that the District Court erred in holding that the CDA violated both the First Amendment because it is overbroad and the Fifth Amendment because it is vague. While we discuss the vagueness of the CDA because of its relevance to the First Amendment overbreadth inquiry, we conclude that the judgment should be affirmed without reaching the Fifth Amendment issue. We begin our analysis by reviewing the principal authorities on which the Government relies. Then, after describing the overbreadth of the CDA, we consider the Government's specific contentions, including its submission that we save portions of the statute either by severance or by fashioning judicial limitations on the scope of its coverage.

IV

In arguing for reversal, the Government contends that the CDA is plainly constitutional under three of our prior decisions: (1) *Ginsberg* v. *New York,* 390 U. S. 629 (1968); (2) *FCC* v. *Pacifica Foundation,* 438 U. S. 726 (1978); and (3) *Renton* v. *Playtime Theatres, Inc.,* 475 U. S. 41 (1986). A close look at these cases, however, raises—rather than relieves—doubts concerning the constitutionality of the CDA.

In *Ginsberg,* we upheld the constitutionality of a New York statute that prohibited selling to minors under 17 years of age material that was considered obscene as to them even if not obscene as to adults. We rejected the defendant's broad submission that "the scope of the constitutional freedom of expression secured to a citizen to read or see material concerned with sex cannot be made to depend on whether the citizen is an adult or a minor." 390 U. S., at 636. In rejecting that contention, we relied not only on the State's independent interest in the well-being of its youth, but also on our consistent recognition of the principle that "the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."[31]

In four important respects, the statute upheld in *Ginsberg* was narrower than the CDA. First, we noted in *Ginsberg* that "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children." *Id.*, at 639. Under the CDA, by contrast, neither the parents' consent—nor even their participation—in the communication would avoid the application of the statute.[32] Second, the New York statute applied only to commercial transactions, *id.*, at 647, whereas the CDA contains no such limitation. Third, the New York statute cabined its definition of material that is harmful to minors with the requirement that it be "utterly without redeeming social importance for minors." *Id.*, at 646. The CDA fails to provide us with any definition of the term "indecent" as used in § 223(a)(1) and, importantly, omits any requirement that the "patently offensive" material covered by § 223(d) lack serious literary, artistic, political, or scientific value. Fourth, the New York statute defined a minor as a person under the age of 17, whereas the CDA, in applying to all those under 18 years, includes an additional year of those nearest majority.

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[31] 390 U. S., at 639. We quoted from *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944): "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."

[32] Given the likelihood that many e-mail transmissions from an adult to a minor are conversations between family members, it is therefore incorrect for the partial dissent to suggest that the provisions of the CDA, even in this narrow area, "are no different from the law we sustained in *Ginsberg*." *Post*, at 892.

In *Pacifica*, we upheld a declaratory order of the Federal Communications Commission, holding that the broadcast of a recording of a 12-minute monologue entitled "Filthy Words" that had previously been delivered to a live audience "could have been the subject of administrative sanctions." 438 U. S., at 730 (internal quotation marks omitted). The Commission had found that the repetitive use of certain words referring to excretory or sexual activities or organs "in an afternoon broadcast when children are in the audience was patently offensive" and concluded that the monologue was indecent "as broadcast." *Id.*, at 735. The respondent did not quarrel with the finding that the afternoon broadcast was patently offensive, but contended that it was not "indecent" within the meaning of the relevant statutes because it contained no prurient appeal. After rejecting respondent's statutory arguments, we confronted its two constitutional arguments: (1) that the Commission's construction of its authority to ban indecent speech was so broad that its order had to be set aside even if the broadcast at issue was unprotected; and (2) that since the recording was not obscene, the First Amendment forbade any abridgment of the right to broadcast it on the radio.

In the portion of the lead opinion not joined by Justices Powell and Blackmun, the plurality stated that the First Amendment does not prohibit all governmental regulation that depends on the content of speech. *Id.*, at 742–743. Accordingly, the availability of constitutional protection for a vulgar and offensive monologue that was not obscene depended on the context of the broadcast. *Id.*, at 744–748. Relying on the premise that "of all forms of communication" broadcasting had received the most limited First Amendment protection, *id.*, at 748–749, the Court concluded that the ease with which children may obtain access to broadcasts, "coupled with the concerns recognized in *Ginsberg,*" justified special treatment of indecent broadcasting. *Id.*, at 749–750.

As with the New York statute at issue in *Ginsberg,* there are significant differences between the order upheld in *Pacifica* and the CDA. First, the order in *Pacifica,* issued by an agency that had been regulating radio stations for decades, targeted a specific broadcast that represented a rather dramatic departure from traditional program content in order to designate when—rather than whether—it would be permissible to air such a program in that particular medium. The CDA's broad categorical prohibitions are not limited to particular times and are not dependent on any evaluation by an agency familiar with the unique characteristics of the Internet. Second, unlike the CDA, the Commission's declaratory order was not punitive; we expressly refused to decide whether the indecent broadcast "would justify a criminal prosecution." 438 U. S., at 750. Finally, the Commission's order applied to a medium which as a matter of history had "received the most limited First Amendment protection," *id.*, at 748, in large part because warnings could not adequately protect the listener from unexpected program content. The Internet, however, has no comparable history. Moreover, the District Court found that the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material.

In *Renton,* we upheld a zoning ordinance that kept adult movie theaters out of residential neighborhoods. The ordinance was aimed, not at the content of the films shown in the theaters, but rather at the "secondary effects"—such as crime and deteriorating property values—that these theaters fostered: "'It is th[e] secondary effect which these zoning ordinances attempt to avoid, not the dissemination of "offensive" speech.'" 475 U. S., at 49 (quoting *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 71, n. 34 (1976)). According to the Government, the CDA is constitutional because it constitutes a sort of "cyberzoning" on the Internet. But the CDA applies broadly to the entire universe of cyberspace. And the purpose of the CDA is to protect children from the primary effects of "indecent" and "patently offensive" speech, rather than any "secondary" effect of such speech. Thus, the CDA is a content-based blanket restriction on speech, and, as such, cannot be "properly analyzed as a form of time, place, and manner regulation." 475 U. S., at 46. See also *Boos* v. *Barry,* 485 U. S. 312, 321 (1988) ("Regulations that focus on the direct impact of speech on its audience" are not properly analyzed under *Renton*); *Forsyth County* v. *Nationalist Movement,* 505 U. S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation").

These precedents, then, surely do not require us to uphold the CDA and are fully consistent with the application of the most stringent review of its provisions.

V

In *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U. S. 546, 557 (1975), we observed that "[e]ach medium of expression . . . may present its own problems." Thus, some of our cases have recognized special justifications for regulation of the broadcast media that are not applicable to other speakers, see *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367 (1969); *FCC* v. *Pacifica Foundation,* 438 U. S. 726 (1978). In these cases, the Court relied on the history of extensive Government regulation of the broadcast medium, see, *e. g., Red Lion,* 395 U. S., at 399–400; the scarcity of available frequencies at its inception, see, *e. g., Turner Broadcasting System, Inc.* v. *FCC,* 512 U. S. 622, 637–638 (1994); and its "invasive" nature, see *Sable Communications of Cal., Inc.* v. *FCC,* 492 U. S. 115, 128 (1989).

Those factors are not present in cyberspace. Neither before nor after the enactment of the CDA have the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry.[33] Moreover, the Internet is not as "invasive" as radio or television. The District Court specifically found that "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.'" 929 F. Supp., at 844 (finding 88). It also found that "[a]lmost all sexually explicit images are preceded by warnings as to the content," and cited testimony that "'odds are slim' that a user would come across a sexually explicit sight by accident." *Ibid.*

We distinguished *Pacifica* in *Sable,* 492 U. S., at 128, on just this basis. In *Sable,* a company engaged in the business of offering sexually oriented prerecorded telephone messages (popularly known as "dial-a-porn") challenged the constitutionality of an amendment to the Communications Act of 1934 that imposed a blanket prohibition on indecent as well as obscene interstate commercial telephone messages. We held that the statute was constitutional insofar as it applied to obscene messages but invalid as applied to indecent messages. In attempting to justify the complete ban and criminalization of indecent commercial telephone messages, the Government relied on *Pacifica,* arguing that the ban was necessary to prevent children from gaining access to such messages. We agreed that "there is a compelling interest in protecting the physical and psychological well-being of minors" which extended to shielding them from indecent messages that are not obscene by adult standards, 492 U. S., at

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[33] Cf. *Pacifica Foundation* v. *FCC,* 556 F. 2d 9, 36 (CADC 1977) (Leventhal, J., dissenting), rev'd, *FCC* v. *Pacifica Foundation,* 438 U. S. 726 (1978). When *Pacifica* was decided, given that radio stations were allowed to operate only pursuant to federal license, and that Congress had enacted legislation prohibiting licensees from broadcasting indecent speech, there was a risk that members of the radio audience might infer some sort of official or societal approval of whatever was heard over the radio, see 556 F. 2d, at 37, n. 18. No such risk attends messages received through the Internet, which is not supervised by any federal agency.

126, but distinguished our "emphatically narrow holding" in *Pacifica* because it did not involve a complete ban and because it involved a different medium of communication, *id.*, at 127. We explained that "the dial-it medium requires the listener to take affirmative steps to receive the communication." *Id.*, at 127–128. "Placing a telephone call," we continued, "is not the same as turning on a radio and being taken by surprise by an indecent message." *Id.*, at 128.

Finally, unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a "scarce" expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds. The Government estimates that "[a]s many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999."[34] This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, "the content on the Internet is as diverse as human thought." 929 F. Supp., at 842 (finding 74). We agree with its conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.

VI

Regardless of whether the CDA is so vague that it violates the Fifth Amendment, the many ambiguities concerning the scope of its coverage render it problematic for purposes of the First Amendment. For instance, each of the two parts of the CDA uses a different linguistic form. The first uses the word "indecent," 47 U. S. C. § 223(a) (1994 ed., Supp. II), while the second speaks of material that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs," § 223(d). Given the absence of a definition of either term,[35] this difference in language will provoke uncertainty among speakers about how the two standards relate to each other[36] and just what they mean.[37] Could a speaker confidently assume that a serious discussion about birth control practices, homosexuality, the First Amendment issues raised by the Appendix to our *Pacifica* opinion, or the consequences of prison rape would not violate the CDA? This uncertainty undermines the likelihood that the CDA has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials.

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[34] Juris. Statement 3 (citing 929 F. Supp., at 831 (finding 3)).

The vagueness of the CDA is a matter of special concern for two reasons. First, the CDA is a content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech. See, *e. g., Gentile* v. *State Bar of Nev.,* 501 U. S. 1030, 1048–1051 (1991). Second, the CDA is a criminal statute. In addition to the opprobrium and stigma of a criminal conviction, the CDA threatens violators with penalties including up to two years in prison for each act of violation. The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images. See, *e. g., Dombrowski* v. *Pfister,* 380 U. S. 479, 494 (1965). As a practical matter, this increased deterrent effect, coupled with the "risk of discriminatory enforcement" of vague regulations, poses greater First Amendment concerns than those implicated by the civil regulation reviewed in *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC,* 518 U. S. 727 (1996).

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[35] "Indecent" does not benefit from any textual embellishment at all. "Patently offensive" is qualified only to the extent that it involves "sexual or excretory activities or organs" taken "in context" and "measured by contemporary community standards."

[36] See *Gozlon-Peretz* v. *United States*, 498 U. S. 395, 404 (1991) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion" (internal quotation marks omitted)).

[37] The statute does not indicate whether the "patently offensive" and "indecent" determinations should be made with respect to minors or the population as a whole. The Government asserts that the appropriate standard is "what is suitable material for minors." Reply Brief for Appellants 18, n. 13 (citing *Ginsberg* v. *New York*, 390 U. S. 629, 633 (1968)). But the Conferees expressly rejected amendments that would have imposed such a "harmful to minors" standard. See S. Conf. Rep. No. 104–230, p. 189 (1996) (S. Conf. Rep.), 142 Cong. Rec. H1145, H1165–H1166 (Feb. 1, 1996). The Conferees also rejected amendments that would have limited the proscribed materials to those lacking redeeming value. See *ibid.*

The Government argues that the statute is no more vague than the obscenity standard this Court established in *Miller* v. *California,* 413 U. S. 15 (1973). But that is not so. In *Miller,* this Court reviewed a criminal conviction against a commercial vendor who mailed brochures containing pictures of sexually explicit activities to individuals who had not requested such materials. *Id.,* at 18. Having struggled for some time to establish a definition of obscenity, we set forth in *Miller* the test for obscenity that controls to this day:

> "(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.,* at 24 (internal quotation marks and citations omitted).

Because the CDA's "patently offensive" standard (and, we assume, *arguendo,* its synonymous "indecent" standard) is one part of the three-prong *Miller* test, the Government reasons, it cannot be unconstitutionally vague.

The Government's assertion is incorrect as a matter of fact. The second prong of the *Miller* test—the purportedly analogous standard—contains a critical requirement that is omitted from the CDA: that the proscribed material be "specifically defined by the applicable state law." This requirement reduces the vagueness inherent in the open-ended term "patently offensive" as used in the CDA. Moreover, the *Miller* definition is limited to "sexual conduct," whereas the CDA extends also to include (1) "excretory activities" as well as (2) "organs" of both a sexual and excretory nature.

The Government's reasoning is also flawed. Just because a definition including three limitations is not vague, it does not follow that one of those limitations, standing by itself, is not vague.[38] Each of *Miller*'s additional two prongs—(1) that, taken as a whole, the material appeal to the "prurient" interest, and (2) that it "lac[k] serious literary, artistic, political, or scientific value"—critically limits the uncertain sweep of the obscenity definition. The second requirement is particularly important because, unlike the "patently offensive" and "prurient interest" criteria, it is not judged by contemporary community standards. See *Pope* v. *Illinois,* 481 U. S. 497, 500 (1987). This "societal value" requirement, absent in the CDA, allows appellate courts to impose some limitations and regularity on the definition by setting, as a matter of law, a national floor for socially redeeming value. The Government's contention that courts will be able to give such legal limitations to the CDA's standards is belied by *Miller*'s own rationale for having juries determine whether material is "patently offensive" according to community standards: that such questions are essentially ones of *fact.*[39]

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[38] Even though the word "trunk," standing alone, might refer to luggage, a swimming suit, the base of a tree, or the long nose of an animal, its meaning is clear when it is one prong of a three-part description of a species of gray animals.

In contrast to *Miller* and our other previous cases, the CDA thus presents a greater threat of censoring speech that, in fact, falls outside the statute's scope. Given the vague contours of the coverage of the statute, it unquestionably silences some speakers whose messages would be entitled to constitutional protection. That danger provides further reason for insisting that the statute not be overly broad. The CDA's burden on protected speech cannot be justified if it could be avoided by a more carefully drafted statute.

VII

We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.

In evaluating the free speech rights of adults, we have made it perfectly clear that "[s]exual expression which is indecent but not obscene is protected by the First Amendment." *Sable,* 492 U. S., at 126. See also *Carey* v. *Population Services Int'l,* 431 U. S. 678, 701 (1977) ("[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression"). Indeed, *Pacifica* itself admonished that "the fact that society may find speech offensive is not a sufficient reason for suppressing it." 438 U. S., at 745.

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[39] 413 U. S., at 30 (Determinations of "what appeals to the 'prurient interest' or is 'patently offensive' . . . are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists"). The CDA, which implements the "contemporary community standards" language of *Miller,* thus conflicts with the Conferees' own assertion that the CDA was intended "to establish a uniform national standard of content regulation." S. Conf. Rep., at 191.

It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. See *Ginsberg,* 390 U. S., at 639; *Pacifica,* 438 U. S., at 749. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults. As we have explained, the Government may not "reduc[e] the adult population . . . to . . . only what is fit for children." *Denver,* 518 U. S., at 759 (internal quotation marks omitted) (quoting *Sable,* 492 U. S., at 128).[40] "[R]egardless of the strength of the government's interest" in protecting children, "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." *Bolger* v. *Youngs Drug Products Corp.,* 463 U. S. 60, 74–75 (1983).

The District Court was correct to conclude that the CDA effectively resembles the ban on "dial-a-porn" invalidated in *Sable.* 929 F. Supp., at 854. In *Sable,* 492 U. S., at 129, this Court rejected the argument that we should defer to the congressional judgment that nothing less than a total ban would be effective in preventing enterprising youngsters from gaining access to indecent communications. *Sable* thus made clear that the mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into its validity.[41] As we pointed out last

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[40] Accord, *Butler* v. *Michigan,* 352 U. S. 380, 383 (1957) (ban on sale to adults of books deemed harmful to children unconstitutional); *Sable Communications of Cal., Inc.* v. *FCC,* 492 U. S. 115, 128 (1989) (ban on "dial-a-porn" messages unconstitutional); *Bolger* v. *Youngs Drug Products Corp.,* 463 U. S. 60, 73 (1983) (ban on mailing of unsolicited advertisement for contraceptives unconstitutional).

[41] The lack of legislative attention to the statute at issue in *Sable* suggests another parallel with this case. Compare 492 U. S., at 129–130 ("[A]side from conclusory statements during the debates by proponents of

Term, that inquiry embodies an "overarching commitment" to make sure that Congress has designed its statute to accomplish its purpose "without imposing an unnecessarily great restriction on speech." *Denver,* 518 U. S., at 741.

In arguing that the CDA does not so diminish adult communication, the Government relies on the incorrect factual premise that prohibiting a transmission whenever it is known that one of its recipients is a minor would not interfere with adult-to-adult communication. The findings of the District Court make clear that this premise is untenable. Given the size of the potential audience for most messages, in the absence of a viable age verification process, the sender must be charged with knowing that one or more minors will likely view it. Knowledge that, for instance, one or more members of a 100-person chat group will be a minor—and therefore that it would be a crime to send the group an indecent message—would surely burden communication among adults.[42]

The District Court found that at the time of trial existing technology did not include any effective method for a sender to prevent minors from obtaining access to its communications on the Internet without also denying access to adults. The Court found no effective way to determine the age of a user who is accessing material through e-mail, mail exploders, newsgroups, or chat rooms. 929 F. Supp., at 845 (findings 90–94). As a practical matter, the Court also found

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the bill, as well as similar assertions in hearings on a substantially identical bill the year before, . . . the congressional record presented to us contains no evidence as to *how* effective or ineffective the FCC's most recent regulations were or might prove to be. . . . No Congressman or Senator purported to present a considered judgment with respect to how often or to what extent minors could or would circumvent the rules and have access to dial-a-porn messages" (footnote omitted)), with n. 24, *supra.*

[42] The Government agrees that these provisions are applicable whenever "a sender transmits a message to more than one recipient, knowing that at least one of the specific persons receiving the message is a minor." Opposition to Motion to Affirm and Reply to Juris. Statement 4–5, n. 1.

that it would be prohibitively expensive for noncommercial—as well as some commercial—speakers who have Web sites to verify that their users are adults. *Id.*, at 845–848 (findings 95–116).[43] These limitations must inevitably curtail a significant amount of adult communication on the Internet. By contrast, the District Court found that "[d]espite its limitations, currently available *user-based* software suggests that a reasonably effective method by which *parents* can prevent their children from accessing sexually explicit and other material which *parents* may believe is inappropriate for their children will soon be widely available." *Id.*, at 842 (finding 73) (emphases added).

The breadth of the CDA's coverage is wholly unprecedented. Unlike the regulations upheld in *Ginsberg* and *Pacifica*, the scope of the CDA is not limited to commercial speech or commercial entities. Its open-ended prohibitions embrace all nonprofit entities and individuals posting indecent messages or displaying them on their own computers in the presence of minors. The general, undefined terms "indecent" and "patently offensive" cover large amounts of nonpornographic material with serious educational or other value.[44] Moreover, the "community standards" criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message.[45] The regulated subject matter includes any of the seven "dirty words" used in the *Pacifica* monologue, the use of which the Government's expert acknowledged could constitute a felony. See Olsen Testimony, Tr. Vol. V, 53:16–54:10. It may also extend to discussions about prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalog of the Carnegie Library.

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[43] The Government asserts that "[t]here is nothing constitutionally suspect about requiring commercial Web site operators . . . to shoulder the modest burdens associated with their use." Brief for Appellants 35. As a matter of fact, however, there is no evidence that a "modest burden" would be effective.

[44] Transmitting obscenity and child pornography, whether via the Internet or other means, is already illegal under federal law for both adults and juveniles. See 18 U. S. C. §§1464–1465 (criminalizing obscenity); §2251 (criminalizing child pornography). In fact, when Congress was considering the CDA, the Government expressed its view that the law was unnecessary because existing laws already authorized its ongoing efforts to prosecute obscenity, child pornography, and child solicitation. See 141 Cong. Rec. 16026 (1995) (letter from Kent Markus, Acting Assistant Attorney General, U. S. Department of Justice, to Sen. Leahy).

For the purposes of our decision, we need neither accept nor reject the Government's submission that the First Amendment does not forbid a blanket prohibition on all "indecent" and "patently offensive" messages communicated to a 17-year-old—no matter how much value the message may contain and regardless of parental approval. It is at least clear that the strength of the Government's interest in protecting minors is not equally strong throughout the coverage of this broad statute. Under the CDA, a parent allowing her 17-year-old to use the family computer to obtain information on the Internet that she, in her parental judgment, deems appropriate could face a lengthy prison term. See 47 U. S. C. § 223(a)(2) (1994 ed., Supp. II). Similarly, a parent who sent his 17-year-old college freshman information on birth control via e-mail could be incarcerated even though neither he, his child, nor anyone in their home community found the material "indecent" or "patently offensive," if the college town's community thought otherwise.

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[45] Citing *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520 (1993), among other cases, appellees offer an additional reason why, in their view, the CDA fails strict scrutiny. Because so much sexually explicit content originates overseas, they argue, the CDA cannot be "effective." Brief for Appellees American Library Association et al. 33–34. This argument raises difficult issues regarding the intended, as well as the permissible scope of, extraterritorial application of the CDA. We find it unnecessary to address those issues to dispose of this case.

The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA. It has not done so. The arguments in this Court have referred to possible alternatives such as requiring that indecent material be "tagged" in a way that facilitates parental control of material coming into their homes, making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet—such as commercial Web sites—differently from others, such as chat rooms. Particularly in the light of the absence of any detailed findings by the Congress, or even hearings addressing the special problems of the CDA, we are persuaded that the CDA is not narrowly tailored if that requirement has any meaning at all.

VIII

In an attempt to curtail the CDA's facial overbreadth, the Government advances three additional arguments for sustaining the Act's affirmative prohibitions: (1) that the CDA is constitutional because it leaves open ample "alternative channels" of communication; (2) that the plain meaning of the CDA's "knowledge" and "specific person" requirement significantly restricts its permissible applications; and (3) that the CDA's prohibitions are "almost always" limited to material lacking redeeming social value.

The Government first contends that, even though the CDA effectively censors discourse on many of the Internet's modalities—such as chat groups, newsgroups, and mail exploders—it is nonetheless constitutional because it provides a "reasonable opportunity" for speakers to engage in the restricted speech on the World Wide Web. Brief for Appellants 39. This argument is unpersuasive because the CDA regulates speech on the basis of its content. A "time, place, and manner" analysis is therefore inapplicable. See *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 536 (1980). It is thus immaterial whether such speech would be feasible on the Web (which, as the Government's own expert acknowledged, would cost up to $10,000 if the speaker's interests were not accommodated by an existing Web site, not including costs for data base management and age verification). The Government's position is equivalent to arguing that a statute could ban leaflets on certain subjects as long as individuals are free to publish books. In invalidating a number of laws that banned leafletting on the streets *regardless of* their content, we explained that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State (Town of Irvington),* 308 U. S. 147, 163 (1939).

The Government also asserts that the "knowledge" requirement of both §§223(a) and (d), especially when coupled with the "specific child" element found in §223(d), saves the CDA from overbreadth. Because both sections prohibit the dissemination of indecent messages only to persons known to be under 18, the Government argues, it does not require transmitters to "refrain from communicating indecent material to adults; they need only refrain from disseminating such materials to persons they know to be under 18." Brief for Appellants 24. This argument ignores the fact that most Internet forums—including chat rooms, newsgroups, mail exploders, and the Web—are open to all comers. The Government's assertion that the knowledge requirement somehow protects the communications of adults is therefore untenable. Even the strongest reading of the "specific person" requirement of §223(d) cannot save the statute. It would confer broad powers of censorship, in the form of a "heckler's veto," upon any opponent of indecent speech who might simply log on and inform the would-be discoursers that his 17-year-old child—a "specific person . . . under 18 years of age," 47 U. S. C. §223(d)(1)(A) (1994 ed., Supp. II)—would be present.

Finally, we find no textual support for the Government's submission that material having scientific, educational, or other redeeming social value will necessarily fall outside the CDA's "patently offensive" and "indecent" prohibitions. See also n. 37, *supra.*

IX

The Government's three remaining arguments focus on the defenses provided in § 223(e)(5).[46] First, relying on the "good faith, reasonable, effective, and appropriate actions" provision, the Government suggests that "tagging" provides a defense that saves the constitutionality of the CDA. The suggestion assumes that transmitters may encode their indecent communications in a way that would indicate their contents, thus permitting recipients to block their reception with appropriate software. It is the requirement that the good-faith action must be "effective" that makes this defense illusory. The Government recognizes that its proposed screening software does not currently exist. Even if it did, there is no way to know whether a potential recipient will actually block the encoded material. Without the impossible knowledge that every guardian in America is screening for the "tag," the transmitter could not reasonably rely on its action to be "effective."

For its second and third arguments concerning defenses—which we can consider together—the Government relies on the latter half of § 223(e)(5), which applies when the transmitter has restricted access by requiring use of a verified credit card or adult identification. Such verification is not only technologically available but actually is used by commercial providers of sexually explicit material. These providers, therefore, would be protected by the defense. Under the findings of the District Court, however, it is not economically feasible for most noncommercial speakers to employ such verification. Accordingly, this defense would not significantly narrow the statute's burden on noncommercial speech. Even with respect to the commercial pornographers that would be protected by the defense, the Government failed to adduce any evidence that these verification techniques actually preclude minors from posing as adults.[47] Given that the risk of criminal sanctions "hovers over each content provider, like the proverbial sword of Damocles,"[48] the District Court correctly refused to rely on unproven future technology to save the statute. The Government thus failed to prove that the proffered defense would significantly reduce the heavy burden on adult speech produced by the prohibition on offensive displays.

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[46] For the full text of § 223(e)(5), see n. 26, *supra.*

We agree with the District Court's conclusion that the CDA places an unacceptably heavy burden on protected speech, and that the defenses do not constitute the sort of "narrow tailoring" that will save an otherwise patently invalid unconstitutional provision. In *Sable*, 492 U. S., at 127, we remarked that the speech restriction at issue there amounted to "'burn[ing] the house to roast the pig.'" The CDA, casting a far darker shadow over free speech, threatens to torch a large segment of the Internet community.

X

At oral argument, the Government relied heavily on its ultimate fall-back position: If this Court should conclude that the CDA is insufficiently tailored, it urged, we should save the statute's constitutionality by honoring the severability clause, see 47 U. S. C. § 608, and construing nonseverable terms narrowly. In only one respect is this argument acceptable.

A severability clause requires textual provisions that can be severed. We will follow § 608's guidance by leaving constitutional textual elements of the statute intact in the one place where they are, in fact, severable. The "indecency" provision, 47 U. S. C. § 223(a) (1994 ed., Supp. II), applies to "any comment, request, suggestion, proposal, image, or other communication which is *obscene or indecent.*" (Emphasis added.) Appellees do not challenge the application of the statute to obscene speech, which, they acknowledge, can be banned totally because it enjoys no First Amendment protection. See *Miller*, 413 U. S., at 18. As set forth by the statute, the restriction of "obscene" material enjoys a textual manifestation separate from that for "indecent" material, which we have held unconstitutional. Therefore, we will sever the term "or indecent" from the statute, leaving the rest of § 223(a) standing. In no other respect, however, can § 223(a) or § 223(d) be saved by such a textual surgery.

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[47] Thus, ironically, this defense may significantly protect commercial purveyors of obscene postings while providing little (or no) benefit for transmitters of indecent messages that have significant social or artistic value.

[48] 929 F. Supp., at 855–856.

The Government also draws on an additional, less traditional aspect of the CDA's severability clause, 47 U. S. C. § 608, which asks any reviewing court that holds the statute facially unconstitutional not to invalidate the CDA in application to "other persons or circumstances" that might be constitutionally permissible. It further invokes this Court's admonition that, absent "countervailing considerations," a statute should "be declared invalid to the extent it reaches too far, but otherwise left intact." *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 503–504 (1985). There are two flaws in this argument.

First, the statute that grants our jurisdiction for this expedited review, § 561 of the Telecommunications Act of 1961, note following 47 U. S. C. § 223 (1994 ed., Supp. II), limits that jurisdictional grant to actions challenging the CDA "on its face." Consistent with § 561, the plaintiffs who brought this suit and the three-judge panel that decided it treated it as a facial challenge. We have no authority, in this particular posture, to convert this litigation into an "as-applied" challenge. Nor, given the vast array of plaintiffs, the range of their expressive activities, and the vagueness of the statute, would it be practicable to limit our holding to a judicially defined set of specific applications.

Second, one of the "countervailing considerations" mentioned in *Brockett* is present here. In considering a facial challenge, this Court may impose a limiting construction on a statute only if it is "readily susceptible" to such a construction. *Virginia* v. *American Booksellers Assn., Inc.,* 484 U. S. 383, 397 (1988). See also *Erznoznik* v. *Jacksonville,* 422 U. S. 205, 216 (1975) ("readily subject" to narrowing construction). The open-ended character of the CDA provides no guidance whatever for limiting its coverage.

This case is therefore unlike those in which we have construed a statute narrowly because the text or other source of congressional intent identified a clear line that this Court could draw. Cf., *e. g., Brockett,* 472 U. S., at 504–505 (invalidating obscenity statute only to the extent that word "lust" was actually or effectively excised from statute); *United States* v. *Grace,* 461 U. S. 171, 180–183 (1983) (invalidating federal statute banning expressive displays only insofar as it extended to public sidewalks when clear line could be drawn between sidewalks and other grounds that comported with congressional purpose of protecting the building, grounds, and people therein). Rather, our decision in *United States* v. *Treasury Employees,* 513 U. S. 454, 479, n. 26 (1995), is applicable. In that case, we declined to "dra[w] one or more lines between categories of speech covered by an overly broad statute, when Congress has sent inconsistent signals as to where the new line or lines should be drawn" because doing so "involves a far more serious invasion of the legislative domain."[49] This Court "will not rewrite a . . . law to conform it to constitutional requirements." *American Booksellers,* 484 U. S., at 397.[50]

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[49] As this Court long ago explained: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government." *United States* v. *Reese,* 92 U. S. 214, 221 (1876). In part because of these

XI

In this Court, though not in the District Court, the Government asserts that—in addition to its interest in protecting children—its "[e]qually significant" interest in fostering the growth of the Internet provides an independent basis for upholding the constitutionality of the CDA. Brief for Appellants 19. The Government apparently assumes that the unregulated availability of "indecent" and "patently offensive" material on the Internet is driving countless citizens away from the medium because of the risk of exposing themselves or their children to harmful material.

We find this argument singularly unpersuasive. The dramatic expansion of this new marketplace of ideas contradicts the factual basis of this contention. The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.

For the foregoing reasons, the judgment of the District Court is affirmed.

It is so ordered.

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separation-of-powers concerns, we have held that a severability clause is "an aid merely; not an inexorable command." *Dorchy* v. *Kansas,* 264 U. S. 286, 290 (1924).

[50] See also *Osborne* v. *Ohio,* 495 U. S. 103, 121 (1990) (judicial rewriting of statutes would derogate Congress' "incentive to draft a narrowly tailored law in the first place").

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE joins, concurring in the judgment in part and dissenting in part.

I write separately to explain why I view the Communications Decency Act of 1996 (CDA) as little more than an attempt by Congress to create "adult zones" on the Internet. Our precedent indicates that the creation of such zones can be constitutionally sound. Despite the soundness of its purpose, however, portions of the CDA are unconstitutional because they stray from the blueprint our prior cases have developed for constructing a "zoning law" that passes constitutional muster.

Appellees bring a facial challenge to three provisions of the CDA. The first, which the Court describes as the "indecency transmission" provision, makes it a crime to knowingly transmit an obscene or indecent message or image to a person the sender knows is under 18 years old. 47 U. S. C. § 223(a)(1)(B) (1994 ed., Supp. II). What the Court classifies as a single " 'patently offensive display' " provision, see *ante*, at 859, is in reality two separate provisions. The first of these makes it a crime to knowingly send a patently offensive message or image to a specific person under the age of 18 ("specific person" provision). § 223(d)(1)(A). The second criminalizes the display of patently offensive messages or images "in a[ny] manner available" to minors ("display" provision). § 223(d)(1)(B). None of these provisions purports to keep indecent (or patently offensive) material away from adults, who have a First Amendment right to obtain this speech. *Sable Communications of Cal., Inc.* v. *FCC,* 492 U. S. 115, 126 (1989) ("Sexual expression which is indecent but not obscene is protected by the First Amendment"). Thus, the undeniable purpose of the CDA is to segregate indecent material on the Internet into certain areas that minors cannot access. See S. Conf. Rep. No. 104–230, p. 189 (1996) (CDA imposes "access restrictions . . . to protect minors from exposure to indecent material").

The creation of "adult zones" is by no means a novel concept. States have long denied minors access to certain establishments frequented by adults.[1] States have also denied minors access to speech deemed to be "harmful to minors."[2]

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[1] See, *e. g.*, Alaska Stat. Ann. § 11.66.300 (1996) (no minors in "adult entertainment" places); Ariz. Rev. Stat. Ann. § 13–3556 (1989) (no minors in places where people expose themselves); Ark. Code Ann. §§ 5–27–223, 5–27–224 (1993) (no minors in poolrooms and bars); Colo. Rev. Stat. § 18–7–502(2) (1986) (no minors in places displaying movies or shows that are "harmful to children"); Del. Code Ann., Tit. 11, § 1365(i)(2) (1995) (same); D. C. Code Ann. § 22–2001(b)(1)(B) (1996) (same); Fla. Stat. § 847.013(2) (1994) (same); Ga. Code Ann. § 16–12–103(b) (1996) (same); Haw. Rev. Stat. § 712–1215(1)(b) (1994) (no minors in movie houses or shows that are "pornographic for minors"); Idaho Code § 18–1515(2) (1987) (no minors in places displaying movies or shows that are "harmful to minors"); La. Rev. Stat. Ann. § 14:91.11(B) (West 1986) (no minors in places displaying movies that depict sex acts and appeal to minors' prurient interest); Md. Ann. Code, Art. 27, § 416E (1996) (no minors in establishments where certain enumerated acts are performed or portrayed); Mich. Comp. Laws § 750.141 (1991) (no minors without an adult in places where alcohol is sold); Minn. Stat. § 617.294 (1987 and Supp. 1997) (no minors in places displaying movies or shows that are "harmful to minors"); Miss. Code Ann. § 97–5–11 (1994) (no minors in poolrooms, billiard halls, or where alcohol is sold); Mo. Rev. Stat. § 573.507 (1995) (no minors in adult cabarets); Neb. Rev. Stat. § 28–809 (1995) (no minors in places displaying movies or shows that are "harmful to minors"); Nev. Rev. Stat. § 201.265(3) (1997) (same); N. H. Rev. Stat. Ann. § 571–B:2(II) (1986) (same); N. M. Stat. Ann. § 30–37–3 (1989) (same); N. Y. Penal Law § 235.21(2) (McKinney 1989) (same); N. D. Cent. Code § 12.1–27.1–03 (1985 and Supp. 1995) (same); 18 Pa. Cons. Stat. § 5903(a) (Supp. 1997) (same); S. D. Comp. Laws Ann. § 22–24–30 (1988) (same); Tenn. Code Ann. § 39–17–911(b) (1991) (same); Vt. Stat. Ann., Tit. 13, § 2802(b) (1974) (same); Va. Code Ann. § 18.2–391 (1996) (same).

[2] See, *e. g.*, Ala. Code § 13A–12–200.5 (1994); Ariz. Rev. Stat. Ann. § 13–3506 (1989); Ark. Code Ann. § 5–68–502 (1993); Cal. Penal Code Ann. § 313.1 (West Supp. 1997); Colo. Rev. Stat. § 18–7–502(1) (1986); Conn. Gen. Stat. § 53a–196 (1994); Del. Code Ann., Tit. 11, § 1365(i)(1) (1995); D. C. Code Ann. § 22–2001(b)(1)(A) (1996); Fla. Stat. § 847.012 (1994); Ga. Code Ann. § 16–12–103(a) (1996); Haw. Rev. Stat. § 712–1215(1) (1994); Idaho Code § 18–1515(1) (1987); Ill. Comp. Stat., ch. 720, § 5/11–21 (1993); Ind. Code § 35–49–3–3(1) (Supp. 1996); Iowa Code § 728.2 (1993); Kan. Stat. Ann. § 21–4301c(a)(2) (1988); La. Rev. Stat. Ann. § 14:91.11(B) (West 1986);

The Court has previously sustained such zoning laws, but only if they respect the First Amendment rights of adults and minors. That is to say, a zoning law is valid if (i) it does not unduly restrict adult access to the material; and (ii) minors have no First Amendment right to read or view the banned material. As applied to the Internet as it exists in 1997, the "display" provision and some applications of the "indecency transmission" and "specific person" provisions fail to adhere to the first of these limiting principles by restricting adults' access to protected materials in certain circumstances. Unlike the Court, however, I would invalidate the provisions only in those circumstances.

I

Our cases make clear that a "zoning" law is valid only if adults are still able to obtain the regulated speech. If they cannot, the law does more than simply keep children away from speech they have no right to obtain—it interferes with the rights of adults to obtain constitutionally protected speech and effectively "reduce[s] the adult population . . . to reading only what is fit for children." *Butler* v. *Michigan*, 352 U. S. 380, 383 (1957). The First Amendment does not tolerate such interference. See *ibid.* (striking down a Michi-

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Md. Ann. Code, Art. 27, § 416B (1996); Mass. Gen. Laws, ch. 272, § 28 (1992); Minn. Stat. § 617.293 (1987 and Supp. 1997); Miss. Code Ann. § 97-5-11 (1994); Mo. Rev. Stat. § 573.040 (1995); Mont. Code Ann. § 45-8-206 (1995); Neb. Rev. Stat. § 28-808 (1995); Nev. Rev. Stat. §§ 201.265(1), (2) (1997); N. H. Rev. Stat. Ann. § 571-B:2(I) (1986); N. M. Stat. Ann. § 30-37-2 (1989); N. Y. Penal Law § 235.21(1) (McKinney 1989); N. C. Gen. Stat. § 14-190.15(a) (1993); N. D. Cent. Code § 12.1-27.1-03 (1985 and Supp. 1995); Ohio Rev. Code Ann. § 2907.31(A)(1) (Supp. 1997); Okla. Stat., Tit. 21, § 1040.76(2) (Supp. 1997); 18 Pa. Cons. Stat. § 5903(c) (Supp. 1997); R. I. Gen. Laws § 11-31-10(a) (1996); S. C. Code Ann. § 16-15-385(A) (Supp. 1996); S. D. Comp. Laws Ann. § 22-24-28 (1988); Tenn. Code Ann. § 39-17-911(a) (1991); Tex. Penal Code Ann. § 43.24(b) (1994); Utah Code Ann. § 76-10-1206(2) (1995); Vt. Stat. Ann., Tit. 13, § 2802(a) (1974); Va. Code Ann. § 18.2-391 (1996); Wash. Rev. Code § 9.68.060 (1988 and Supp. 1997); Wis. Stat. § 948.11(2) (Supp. 1995).

gan criminal law banning sale of books—to minors or adults—that contained words or pictures that "'tende[d] to . . . corrup[t] the morals of youth'"); *Sable Communications, supra* (invalidating federal law that made it a crime to transmit indecent, but nonobscene, commercial telephone messages to minors and adults); *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 74 (1983) (striking down a federal law prohibiting the mailing of unsolicited advertisements for contraceptives). If the law does not unduly restrict adults' access to constitutionally protected speech, however, it may be valid. In *Ginsberg* v. *New York*, 390 U. S. 629, 634 (1968), for example, the Court sustained a New York law that barred store owners from selling pornographic magazines to minors in part because adults could still buy those magazines.

The Court in *Ginsberg* concluded that the New York law created a constitutionally adequate adult zone simply because, on its face, it denied access only to minors. The Court did not question—and therefore necessarily assumed—that an adult zone, once created, would succeed in preserving adults' access while denying minors' access to the regulated speech. Before today, there was no reason to question this assumption, for the Court has previously only considered laws that operated in the physical world, a world that with two characteristics that make it possible to create "adult zones": geography and identity. See Lessig, Reading the Constitution in Cyberspace, 45 Emory L. J. 869, 886 (1996). A minor can see an adult dance show only if he enters an establishment that provides such entertainment. And should he attempt to do so, the minor will not be able to conceal completely his identity (or, consequently, his age). Thus, the twin characteristics of geography and identity enable the establishment's proprietor to prevent children from entering the establishment, but to let adults inside.

The electronic world is fundamentally different. Because it is no more than the interconnection of electronic pathways, cyberspace allows speakers and listeners to mask their identities. Cyberspace undeniably reflects some form of geography; chat rooms and Web sites, for example, exist at fixed "locations" on the Internet. Since users can transmit and receive messages on the Internet without revealing anything about their identities or ages, see *id.*, at 901, however, it is not currently possible to exclude persons from accessing certain messages on the basis of their identity.

Cyberspace differs from the physical world in another basic way: Cyberspace is malleable. Thus, it is possible to construct barriers in cyberspace and use them to screen for identity, making cyberspace more like the physical world and, consequently, more amenable to zoning laws. This transformation of cyberspace is already underway. *Id.*, at 888–889; *id.*, at 887 (cyberspace "is moving . . . from a relatively unzoned place to a universe that is extraordinarily well zoned"). Internet speakers (users who post material on the Internet) have begun to zone cyberspace itself through the use of "gateway" technology. Such technology requires Internet users to enter information about themselves—perhaps an adult identification number or a credit card number—before they can access certain areas of cyberspace, 929 F. Supp. 824, 845 (ED Pa. 1996), much like a bouncer checks a person's driver's license before admitting him to a nightclub. Internet users who access information have not attempted to zone cyberspace itself, but have tried to limit their own power to access information in cyberspace, much as a parent controls what her children watch on television by installing a lock box. This user-based zoning is accomplished through the use of screening software (such as Cyber Patrol or SurfWatch) or browsers with screening capabilities, both of which search addresses and text for keywords that are associated with "adult" sites and, if the user wishes, blocks access to such sites. *Id.*, at 839–842. The Platform for Internet Content Selection project is designed to facilitate user-based zoning by encouraging Internet speakers to rate the content of their speech using codes recognized by all screening programs. *Id.*, at 838–839.

Despite this progress, the transformation of cyberspace is not complete. Although gateway technology has been available on the World Wide Web for some time now, *id.*, at 845; *Shea* v. *Reno*, 930 F. Supp. 916, 933–934 (SDNY 1996), it is not available to *all* Web speakers, 929 F. Supp., at 845–846, and is just now becoming technologically feasible for chat rooms and USENET newsgroups, Brief for Appellants 37–38. Gateway technology is not ubiquitous in cyberspace, and because without it "there is no means of age verification," cyberspace still remains largely unzoned—and unzoneable. 929 F. Supp., at 846; *Shea*, *supra*, at 934. User-based zoning is also in its infancy. For it to be effective, (i) an agreed-upon code (or "tag") would have to exist; (ii) screening software or browsers with screening capabilities would have to be able to recognize the "tag"; and (iii) those programs would have to be widely available—and widely used—by Internet users. At present, none of these conditions is true. Screening software "is not in wide use today" and "only a handful of browsers have screening capabilities." *Shea*, *supra*, at 945–946. There is, moreover, no agreed-upon "tag" for those programs to recognize. 929 F. Supp., at 848; *Shea*, *supra*, at 945.

Although the prospects for the eventual zoning of the Internet appear promising, I agree with the Court that we must evaluate the constitutionality of the CDA as it applies to the Internet as it exists today. *Ante*, at 881. Given the present state of cyberspace, I agree with the Court that the "display" provision cannot pass muster. Until gateway technology is available throughout cyberspace, and it is not in 1997, a speaker cannot be reasonably assured that the speech he displays will reach only adults because it is impossible to confine speech to an "adult zone." Thus, the only way for a speaker to avoid liability under the CDA is to refrain completely from using indecent speech. But this forced silence impinges on the First Amendment right of adults to make and obtain this speech and, for all intents and purposes, "reduce[s] the adult population [on the Internet] to reading only what is fit for children." *Butler,* 352 U. S., at 383. As a result, the "display" provision cannot withstand scrutiny. Accord, *Sable Communications,* 492 U. S., at 126–131; *Bolger* v. *Youngs Drug Products Corp.,* 463 U. S., at 73–75.

The "indecency transmission" and "specific person" provisions present a closer issue, for they are not unconstitutional in all of their applications. As discussed above, the "indecency transmission" provision makes it a crime to transmit knowingly an indecent message to a person the sender knows is under 18 years of age. 47 U. S. C. § 223(a)(1)(B) (1994 ed., Supp. II). The "specific person" provision proscribes the same conduct, although it does not as explicitly require the sender to know that the intended recipient of his indecent message is a minor. § 223(d)(1)(A). The Government urges the Court to construe the provision to impose such a knowledge requirement, see Brief for Appellants 25–27, and I would do so. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council,* 485 U. S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

So construed, both provisions are constitutional as applied to a conversation involving only an adult and one or more minors—*e. g.,* when an adult speaker sends an e-mail knowing the addressee is a minor, or when an adult and minor converse by themselves or with other minors in a chat room. In this context, these provisions are no different from the law we sustained in *Ginsberg.* Restricting what the adult may say to the minors in no way restricts the adult's ability to communicate with other adults. He is not prevented from speaking indecently to other adults in a chat room (because there are no other adults participating in the conversation) and he remains free to send indecent e-mails to other adults. The relevant universe contains only one adult, and the adult in that universe has the power to refrain from using indecent speech and consequently to keep all such speech within the room in an "adult" zone.

The analogy to *Ginsberg* breaks down, however, when more than one adult is a party to the conversation. If a minor enters a chat room otherwise occupied by adults, the CDA effectively requires the adults in the room to stop using indecent speech. If they did not, they could be prosecuted under the "indecency transmission" and "specific person" provisions for any indecent statements they make to the group, since they would be transmitting an indecent message to specific persons, one of whom is a minor. Accord, *ante*, at 876. The CDA is therefore akin to a law that makes it a crime for a bookstore owner to sell pornographic magazines to anyone once a minor enters his store. Even assuming such a law might be constitutional in the physical world as a reasonable alternative to excluding minors completely from the store, the absence of any means of excluding minors from chat rooms in cyberspace restricts the rights of adults to engage in indecent speech in those rooms. The "indecency transmission" and "specific person" provisions share this defect.

But these two provisions do not infringe on adults' speech in *all* situations. And as discussed below, I do not find that the provisions are overbroad in the sense that they restrict minors' access to a substantial amount of speech that minors have the right to read and view. Accordingly, the CDA can be applied constitutionally in some situations. Normally, this fact would require the Court to reject a direct facial challenge. *United States* v. *Salerno*, 481 U. S. 739, 745 (1987) ("A facial challenge to a legislative Act [succeeds only if] the challenger . . . establish[es] that no set of circumstances exists under which the Act would be valid"). Appellees' claim arises under the First Amendment, however, and they argue that the CDA is facially invalid because it is "substantially overbroad"—that is, it "sweeps too broadly . . . [and] penaliz[es] a substantial amount of speech that is constitutionally protected," *Forsyth County* v. *Nationalist Movement*, 505 U. S. 123, 130 (1992). See Brief for Appellees American Library Association et al. 48; Brief for Appellees American Civil Liberties Union et al. 39–41. I agree with the Court that the provisions are overbroad in that they cover any and all communications between adults and minors, regardless of how many adults might be part of the audience to the communication.

This conclusion does not end the matter, however. Where, as here, "the parties challenging the statute are those who desire to engage in protected speech that the overbroad statute purports to punish, . . . [t]he statute may forthwith be declared invalid to the extent that it reaches too far, but otherwise left intact." *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 504 (1985). There is no question that Congress intended to prohibit certain communications between one adult and one or more minors. See 47 U. S. C. § 223(a)(1)(B) (1994 ed., Supp. II) (punishing "[w]hoever . . . initiates the transmission of [any indecent communication] knowing that the recipient of the communication is under 18 years of age"); § 223(d)(1)(A) (punishing "[w]hoever . . . send[s] to a specific person or persons under 18 years of age [a patently offensive message]"). There is also no question that Congress would have enacted a narrower version of these provisions had it known a broader version would be declared unconstitutional. 47 U. S. C. § 608 ("If . . . the application [of any provision of the CDA] to any person or circumstance is held invalid, . . . the application of such provision to other persons or circumstances shall not be affected thereby"). I would therefore sustain the "indecency transmission" and "specific person" provisions to the extent they apply to the transmission of Internet communications where the party initiating the communication knows that all of the recipients are minors.

II

Whether the CDA substantially interferes with the First Amendment rights of minors, and thereby runs afoul of the second characteristic of valid zoning laws, presents a closer question. In *Ginsberg*, the New York law we sustained prohibited the sale to minors of magazines that were "harmful to minors." Under that law, a magazine was "harmful to minors" only if it was obscene as to minors. 390 U. S., at 632–633. Noting that obscene speech is not protected by the First Amendment, *Roth* v. *United States*, 354 U. S. 476, 485 (1957), and that New York was constitutionally free to adjust the definition of obscenity for minors, 390 U. S., at 638, the Court concluded that the law did not "invad[e] the area of freedom of expression constitutionally secured to minors," *id.*, at 637. New York therefore did not infringe upon the First Amendment rights of minors. Cf. *Erznoznik* v. *Jacksonville*, 422 U. S. 205, 213 (1975) (striking down city ordinance that banned nudity that was not "obscene even as to minors").

The Court neither "accept[s] nor reject[s]" the argument that the CDA is facially overbroad because it substantially interferes with the First Amendment rights of minors. *Ante*, at 878. I would reject it. *Ginsberg* established that minors may constitutionally be denied access to material that is obscene as to minors. As *Ginsberg* explained, material is obscene as to minors if it (i) is "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable . . . for minors"; (ii) appeals to the prurient interest of minors; and (iii) is "utterly without redeeming social importance for minors." 390 U. S., at 633. Because the CDA denies minors the right to obtain material that is "patently offensive"—even if it has some redeeming value for minors and even if it does not appeal to their prurient interests—Congress' rejection of the *Ginsberg* "harmful to minors" standard means that the CDA could ban some speech that is "indecent" (*i. e.*, "patently offensive") but that is not obscene as to minors.

I do not deny this possibility, but to prevail in a facial challenge, it is not enough for a plaintiff to show "some" overbreadth. Our cases require a proof of "real" and "substantial" overbreadth, *Broadrick* v. *Oklahoma,* 413 U. S. 601, 615 (1973), and appellees have not carried their burden in this case. In my view, the universe of speech constitutionally protected as to minors but banned by the CDA—*i. e.*, the universe of material that is "patently offensive," but which nonetheless has some redeeming value for minors or does not appeal to their prurient interest—is a very small one. Appellees cite no examples of speech falling within this universe and do not attempt to explain why that universe is substantial "in relation to the statute's plainly legitimate sweep." *Ibid.* That the CDA might deny minors the right to obtain material that has some "value," see *ante,* at 878, is largely beside the point. While discussions about prison rape or nude art, see *ibid.*, may have some redeeming educational value for *adults,* they do not necessarily have any such value for *minors,* and under *Ginsberg,* minors only have a First Amendment right to obtain patently offensive material that has "redeeming social importance *for minors,*" 390 U. S., at 633 (emphasis added). There is also no evidence in the record to support the contention that "many e-mail transmissions from an adult to a minor are conversations between family members," *ante,* at 865, n. 32, and no support for the legal proposition that such speech is absolutely immune from regulation. Accordingly, in my view, the CDA does not burden a substantial amount of minors' constitutionally protected speech.

Thus, the constitutionality of the CDA as a zoning law hinges on the extent to which it substantially interferes with the First Amendment rights of adults. Because the rights of adults are infringed only by the "display" provision and by the "indecency transmission" and "specific person" provisions as applied to communications involving more than one adult, I would invalidate the CDA only to that extent. Insofar as the "indecency transmission" and "specific person" provisions prohibit the use of indecent speech in communications between an adult and one or more minors, however, they can and should be sustained. The Court reaches a contrary conclusion, and from that holding I respectfully dissent.

PRINTZ, SHERIFF/CORONER, RAVALLI COUNTY, MONTANA *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 95–1478. Argued December 3, 1996—Decided June 27, 1997*

Brady Handgun Violence Prevention Act provisions require the Attorney General to establish a national system for instantly checking prospective handgun purchasers' backgrounds, note following 18 U. S. C. § 922, and command the "chief law enforcement officer" (CLEO) of each local jurisdiction to conduct such checks and perform related tasks on an interim basis until the national system becomes operative, § 922(s). Petitioners, the CLEOs for counties in Montana and Arizona, filed separate actions challenging the interim provisions' constitutionality. In each case, the District Court held that the background-check provision was unconstitutional, but concluded that it was severable from the remainder of the Act, effectively leaving a voluntary background-check system in place. The Ninth Circuit reversed, finding none of the interim provisions unconstitutional.

Held:

1. The Brady Act's interim provision commanding CLEOs to conduct background checks, § 922(s)(2), is unconstitutional. Extinguished with it is the duty implicit in the background-check requirement that the CLEO accept completed handgun-applicant statements (Brady Forms) from firearms dealers, §§ 922(s)(1)(A)(i)(III) and (IV). Pp. 904–933.

(a) Because there is no constitutional text speaking to the precise question whether congressional action compelling state officers to execute federal laws is unconstitutional, the answer to the CLEOs' challenge must be sought in historical understanding and practice, in the Constitution's structure, and in this Court's jurisprudence. Pp. 904–905.

(b) Relevant constitutional practice tends to negate the existence of the congressional power asserted here, but is not conclusive. Enactments of the early Congresses seem to contain no evidence of an assumption that the Federal Government may command the States' executive power in the absence of a particularized constitutional authorization. The early enactments establish, at most, that the Constitution

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*Together with No. 95–1503, *Mack* v. *United States,* also on certiorari to the same court.

was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions related to matters appropriate for the judicial power. The Government misplaces its reliance on portions of The Federalist suggesting that federal responsibilities could be imposed on state officers. None of these statements necessarily implies—what is the critical point here—that Congress could impose these responsibilities *without the States' consent.* They appear to rest on the natural assumption that the States would consent, see *FERC* v. *Mississippi*, 456 U. S. 742, 796, n. 35 (O'CONNOR, J., concurring in judgment and dissenting in part). Finally, there is an absence of executive-commandeering federal statutes in the country's later history, at least until very recent years. Even assuming that newer laws represent an assertion of the congressional power challenged here, they are of such recent vintage that they are not probative of a constitutional tradition. Pp. 905–918.

(c) The Constitution's structure reveals a principle that controls these cases: the system of "dual sovereignty." See, *e. g., Gregory* v. *Ashcroft*, 501 U. S. 452, 457. Although the States surrendered many of their powers to the new Federal Government, they retained a residuary and inviolable sovereignty that is reflected throughout the Constitution's text. See, *e. g., Lane County* v. *Oregon*, 7 Wall. 71, 76. The Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people. The Federal Government's power would be augmented immeasurably and impermissibly if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States. Pp. 918–922.

(d) Federal control of state officers would also have an effect upon the separation and equilibration of powers between the three branches of the Federal Government itself. The Brady Act effectively transfers the President's responsibility to administer the laws enacted by Congress, Art. II, §§ 2 and 3, to thousands of CLEOs in the 50 States, who are left to implement the program without meaningful Presidential control. The Federal Executive's unity would be shattered, and the power of the President would be subject to reduction, if Congress could simply require state officers to execute its laws. Pp. 922–923.

(e) Contrary to the contention of JUSTICE STEVENS' dissent, the Brady Act's direction of the actions of state executive officials is not constitutionally valid under Art. I, § 8, as a law "necessary and proper" to the execution of Congress's Commerce Clause power to regulate handgun sales. Where, as here, a law violates the state sovereignty principle, it is not a law "proper for carrying into Execution" delegated powers within the Necessary and Proper Clause's meaning. Cf. *New York* v. *United States,* 505 U. S. 144, 166. The Supremacy Clause does not help the dissent, since it makes "Law of the Land" only "Laws of the United States which shall be made in Pursuance [of the Constitution]." Art. VI, cl. 2. Pp. 923–925.

(f) Finally, and most conclusively in these cases, the Court's jurisprudence makes clear that the Federal Government may not compel the States to enact or administer a federal regulatory program. See, *e. g., New York, supra,* at 188. The attempts of the Government and JUSTICE STEVENS' dissent to distinguish *New York*—on grounds that the Brady Act's background-check provision does not require state legislative or executive officials to make policy; that requiring state officers to perform discrete, ministerial federal tasks does not diminish the state or federal officials' accountability; and that the Brady Act is addressed to individual CLEOs while the provisions invalidated in *New York* were directed to the State itself—are not persuasive. A "balancing" analysis is inappropriate here, since the whole *object* of the law is to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty; it is the very *principle* of separate state sovereignty that such a law offends. See, *e. g., New York, supra,* at 187. Pp. 925–933.

2. With the Act's background-check and implicit receipt-of-forms requirements invalidated, the Brady Act requirements that CLEOs destroy all Brady Forms and related records, § 922(s)(6)(B)(i), and give would-be purchasers written statements of the reasons for determining their ineligibility to receive handguns, § 922(s)(6)(C), require no action whatsoever on the part of CLEOs such as petitioners, who are not voluntary participants in administration of the federal scheme. As to them, these provisions are not unconstitutional, but simply inoperative. Pp. 933–934.

3. The Court declines to address the severability question briefed and argued by the parties: whether firearms dealers remain obliged to forward Brady Forms to CLEOs, §§ 922(s)(1)(A)(i)(III) and (IV), and to wait five business days thereafter before consummating a firearms sale, § 922(s)(1)(A)(ii). These provisions burden only dealers and firearms purchasers, and no plaintiff in either of those categories is before the Court. P. 935.

66 F. 3d 1025, reversed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and THOMAS, JJ., joined. O'CONNOR, J., *post,* p. 935, and THOMAS, J., *post,* p. 936, filed concurring opinions. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and

BREYER, JJ., joined, *post*, p. 939. SOUTER, J., filed a dissenting opinion, *post*, p. 970. BREYER, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 976.

Stephen P. Halbrook argued the cause for petitioners in both cases and filed briefs for petitioner in No. 95–1478. *David T. Hardy* filed briefs for petitioner in No. 95–1503.

Acting Solicitor General Dellinger argued the cause for the United States in both cases. With him on the brief were *Assistant Attorney General Hunger, Deputy Solicitor General Kneedler, Paul R. Q. Wolfson, Mark B. Stern,* and *Stephanie R. Marcus.*†

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†Briefs of *amici curiae* urging reversal were filed for the State of Colorado et al. by *Gale A. Norton,* Attorney General of Colorado, *Stephen K. Erkenbrack,* Chief Deputy Attorney General, *Timothy M. Tymkovich,* Solicitor General, *Richard A. Westfall,* Special Deputy Solicitor General, *Paul Farley,* Deputy Attorney General, and *David B. Kopel,* and by the Attorneys General for their respective States as follows: *Alan G. Lance* of Idaho, *Carla J. Stovall* of Kansas, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Mark W. Barnett* of South Dakota, *James S. Gilmore* of Virginia, and *William U. Hill* of Wyoming; for the Gun Owners Foundation by *James H. Jeffries III* and *James H. Wentzel;* for the Law Enforcement Alliance of America by *James H. Warner;* for the Council of State Governments et al. by *D. Bruce La Pierre;* and for the National Rifle Association of America by *Robert Dowlut* and *Stefan B. Tahmassebi.*

Briefs of *amici curiae* urging affirmance were filed for the American Federation of Labor and Congress of Industrial Organizations by *Jonathan P. Hiatt, David M. Silberman,* and *Laurence Gold;* for the Coalition to Stop Gun Violence et al. by *Donald B. Verrilli, Jr.;* for Handgun Control, Inc., et al. by *Eric J. Mogilnicki, James S. Campbell, Jeffrey P. Singdahlsen, Kathleen M. Miller,* and *Dennis A. Henigan;* and for Senator Herb Kohl et al. by *Andrew J. Pincus.*

Briefs of *amici curiae* were filed for the State of Maryland et al. by *J. Joseph Curran, Jr.,* Attorney General of Maryland, *Andrew H. Baida* and *John B. Howard, Jr.,* Assistant Attorneys General, and *Richard Adams Cordray,* and by the Attorneys General for their respective States as follows: *Richard Blumenthal* of Connecticut, *Robert A. Butterworth* of Florida, *Margery S. Bronster* of Hawaii, *Thomas J. Miller* of Iowa, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Mike Moore* of Mississippi, *Frankie Sue Del Papa* of Nevada, *Michael F. Easley* of North Carolina, *Theodore R. Kulongoski* of Oregon, *Jeffrey B. Pine* of

JUSTICE SCALIA delivered the opinion of the Court.

The question presented in these cases is whether certain interim provisions of the Brady Handgun Violence Prevention Act, Pub. L. 103–159, 107 Stat. 1536, commanding state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks, violate the Constitution.

I

The Gun Control Act of 1968 (GCA), 18 U. S. C. § 921 *et seq.*, establishes a detailed federal scheme governing the distribution of firearms. It prohibits firearms dealers from transferring handguns to any person under 21, not resident in the dealer's State, or prohibited by state or local law from purchasing or possessing firearms, § 922(b). It also forbids possession of a firearm by, and transfer of a firearm to, convicted felons, fugitives from justice, unlawful users of controlled substances, persons adjudicated as mentally defective or committed to mental institutions, aliens unlawfully present in the United States, persons dishonorably discharged from the Armed Forces, persons who have renounced their citizenship, and persons who have been subjected to certain restraining orders or been convicted of a misdemeanor offense involving domestic violence. §§ 922(d) and (g).

In 1993, Congress amended the GCA by enacting the Brady Act. The Act requires the Attorney General to establish a national instant background-check system by November 30, 1998, Pub. L. 103–159, as amended, Pub. L. 103–322, 103 Stat. 2074, note following 18 U. S. C. § 922, and immediately puts in place certain interim provisions until that system becomes operative. Under the interim provisions, a firearms dealer who proposes to transfer a handgun

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Rhode Island, and *James E. Doyle* of Wisconsin; for the Association of the Bar of the City of New York by *Michael A. Cardozo;* and for the Pacific Legal Foundation by *Sharon L. Browne.*

must first: (1) receive from the transferee a statement (the Brady Form), § 922(s)(1)(A)(i)(I), containing the name, address, and date of birth of the proposed transferee along with a sworn statement that the transferee is not among any of the classes of prohibited purchasers, § 922(s)(3); (2) verify the identity of the transferee by examining an identification document, § 922(s)(1)(A)(i)(II); and (3) provide the "chief law enforcement officer" (CLEO) of the transferee's residence with notice of the contents (and a copy) of the Brady Form, §§ 922(s)(1)(A)(i)(III) and (IV). With some exceptions, the dealer must then wait five business days before consummating the sale, unless the CLEO earlier notifies the dealer that he has no reason to believe the transfer would be illegal. § 922(s)(1)(A)(ii).

The Brady Act creates two significant alternatives to the foregoing scheme. A dealer may sell a handgun immediately if the purchaser possesses a state handgun permit issued after a background check, § 922(s)(1)(C), or if state law provides for an instant background check, § 922(s)(1)(D). In States that have not rendered one of these alternatives applicable to all gun purchasers, CLEOs are required to perform certain duties. When a CLEO receives the required notice of a proposed transfer from the firearms dealer, the CLEO must "make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General." § 922(s)(2). The Act does not require the CLEO to take any particular action if he determines that a pending transaction would be unlawful; he may notify the firearms dealer to that effect, but is not required to do so. If, however, the CLEO notifies a gun dealer that a prospective purchaser is ineligible to receive a handgun, he must, upon request, provide the would-be purchaser with a written statement of the reasons for that determination. § 922(s)(6)(C). Moreover, if the

CLEO does not discover any basis for objecting to the sale, he must destroy any records in his possession relating to the transfer, including his copy of the Brady Form. § 922(s)(6)(B)(i). Under a separate provision of the GCA, any person who "knowingly violates [the section of the GCA amended by the Brady Act] shall be fined under this title, imprisoned for not more than 1 year, or both." § 924(a)(5).

Petitioners Jay Printz and Richard Mack, the CLEOs for Ravalli County, Montana, and Graham County, Arizona, respectively, filed separate actions challenging the constitutionality of the Brady Act's interim provisions. In each case, the District Court held that the provision requiring CLEOs to perform background checks was unconstitutional, but concluded that that provision was severable from the remainder of the Act, effectively leaving a voluntary background-check system in place. 856 F. Supp. 1372 (Ariz. 1994); 854 F. Supp. 1503 (Mont. 1994). A divided panel of the Court of Appeals for the Ninth Circuit reversed, finding none of the Brady Act's interim provisions to be unconstitutional. 66 F. 3d 1025 (1995). We granted certiorari. 518 U. S. 1003 (1996).

II

From the description set forth above, it is apparent that the Brady Act purports to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme. Regulated firearms dealers are required to forward Brady Forms not to a federal officer or employee, but to the CLEOs, whose obligation to accept those forms is implicit in the duty imposed upon them to make "reasonable efforts" within five days to determine whether the sales reflected in the forms are lawful. While the CLEOs are subjected to no federal requirement that they prevent the sales determined to be unlawful (it is perhaps assumed that their state-law duties will require prevention or apprehension), they are empowered to grant, in effect, waivers of the federally prescribed

5-day waiting period for handgun purchases by notifying the gun dealers that they have no reason to believe the transactions would be illegal.

Petitioners here object to being pressed into federal service, and contend that congressional action compelling state officers to execute federal laws is unconstitutional. Because there is no constitutional text speaking to this precise question, the answer to the CLEOs' challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court. We treat those three sources, in that order, in this and the next two sections of this opinion.

Petitioners contend that compelled enlistment of state executive officers for the administration of federal programs is, until very recent years at least, unprecedented. The Government contends, to the contrary, that "the earliest Congresses enacted statutes that required the participation of state officials in the implementation of federal laws," Brief for United States 28. The Government's contention demands our careful consideration, since early congressional enactments "provid[e] 'contemporaneous and weighty evidence' of the Constitution's meaning," *Bowsher* v. *Synar*, 478 U. S. 714, 723–724 (1986) (quoting *Marsh* v. *Chambers*, 463 U. S. 783, 790 (1983)). Indeed, such "contemporaneous legislative exposition of the Constitution . . . , acquiesced in for a long term of years, fixes the construction to be given its provisions." *Myers* v. *United States*, 272 U. S. 52, 175 (1926) (citing numerous cases). Conversely if, as petitioners contend, earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist.

The Government observes that statutes enacted by the first Congresses required state courts to record applications for citizenship, Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, to transmit abstracts of citizenship applications and other naturalization records to the Secretary of State, Act of June 18, 1798, ch. 54, § 2, 1 Stat. 567, and to register aliens seeking naturalization and issue certificates of registry, Act of Apr. 14, 1802, ch. 28, § 2, 2 Stat. 154–155. It may well be, however, that these requirements applied only in States that authorized their courts to conduct naturalization proceedings. See Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103; *Holmgren* v. *United States,* 217 U. S. 509, 516–517 (1910) (explaining that the Act of March 26, 1790, "conferred authority upon state courts to admit aliens to citizenship" and refraining from addressing the question "whether the States can be required to enforce such naturalization laws against their consent"); *United States* v. *Jones,* 109 U. S. 513, 519–520 (1883) (stating that these obligations were imposed "with the consent of the States" and "could not be enforced against the consent of the States").[1] Other statutes of that era apparently or at least arguably required state courts to perform functions unrelated to naturalization, such as resolving controversies between a captain and the crew of his ship concerning the seaworthiness of the vessel, Act of July 20, 1790, ch. 29, § 3, 1 Stat. 132, hearing the claims of slave owners who had apprehended fugitive slaves and issuing certificates authorizing the slave's forced removal to the State from which he had fled, Act of Feb. 12, 1793, ch. 7, § 3, 1 Stat. 302–305, taking proof of the claims of Canadian refugees who had assisted the United States during the Revolutionary War, Act of Apr. 7, 1798, ch. 26, § 3, 1 Stat. 548, and ordering the deportation of alien enemies in times of war, Act of July 6, 1798, ch. 66, § 2, 1 Stat. 577–578.

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[1] The dissent is wrong in suggesting, *post,* at 950, n. 9, that the *Second Employers' Liability Cases,* 223 U. S. 1 (1912), eliminate the possibility that the duties imposed on state courts and their clerks in connection with naturalization proceedings were contingent on the State's voluntary assumption of the task of adjudicating citizenship applications. The *Second Employers' Liability Cases* stand for the proposition that a state court must entertain a claim arising under federal law "when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws." *Id.,* at 56–57. This does not necessarily conflict with *Holmgren* and *Jones,* as the States obviously regulate the "ordinary jurisdiction" of their courts. (Our references throughout this opinion to "the dissent" are to the dissenting opinion of JUSTICE STEVENS, joined by JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER. The separate dissenting opinions of JUSTICE SOUTER and JUSTICE BREYER will be referred to as such.)

These early laws establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power. That assumption was perhaps implicit in one of the provisions of the Constitution, and was explicit in another. In accord with the so-called Madisonian Compromise, Article III, § 1, established only a Supreme Court, and made the creation of lower federal courts optional with the Congress—even though it was obvious that the Supreme Court alone could not hear all federal cases throughout the United States. See C. Warren, The Making of the Constitution 325–327 (1928). And the Supremacy Clause, Art. VI, cl. 2, announced that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." It is understandable why courts should have been viewed distinctively in this regard; unlike legislatures and executives, they applied the law of other sovereigns all the time. The principle underlying so-called "transitory" causes of action was that laws which operated elsewhere created obligations in justice that courts of the forum State would enforce. See, *e. g., McKenna* v. *Fisk*, 1 How. 241, 247–249 (1843). The Constitution itself, in the Full Faith and Credit Clause, Art. IV, § 1, generally required such enforcement with respect to obligations arising in other States. See *Hughes* v. *Fetter*, 341 U. S. 609 (1951).

For these reasons, we do not think the early statutes imposing obligations on state courts imply a power of Congress to impress the state executive into its service. Indeed, it can be argued that the numerousness of these statutes, contrasted with the utter lack of statutes imposing obligations on the States' executive (notwithstanding the attractiveness of that course to Congress), suggests an assumed *absence* of such power.[2] The only early federal law the Government has brought to our attention that imposed duties on state executive officers is the Extradition Act of 1793, which required the "executive authority" of a State to cause the arrest and delivery of a fugitive from justice upon the request of the executive authority of the State from which the fugitive had fled. See Act of Feb. 12, 1793, ch. 7, § 1, 1 Stat. 302. That was in direct implementation, however, of the Extradition Clause of the Constitution itself, see Art. IV, § 2.[3]

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[2] Bereft of even a single early, or indeed even pre-20th-century, statute compelling state executive officers to administer federal laws, the dissent is driven to claim that early federal statutes compelled state judges to perform executive functions, which implies a power to compel state executive officers to do so as well. Assuming that this implication would follow (which is doubtful), the premise of the argument is in any case wrong. None of the early statutes directed to state judges or court clerks required the performance of functions more appropriately characterized as executive than judicial (bearing in mind that the line between the two for present purposes is not necessarily identical with the line established by the Constitution for federal separation-of-powers purposes, see *Sweezy* v. *New Hampshire,* 354 U. S. 234, 255 (1957)). Given that state courts were entrusted with the quintessentially adjudicative task of determining whether applicants for citizenship met the requisite qualifications, see Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, it is unreasonable to maintain that the ancillary functions of recording, registering, and certifying the citizenship applications were unalterably executive rather than judicial in nature.

The dissent's assertion that the Act of July 20, 1790, ch. 29, § 3, 1 Stat. 132–133, which required state courts to resolve controversies between captain and crew regarding seaworthiness of a vessel, caused state courts to act "like contemporary regulatory agencies," *post,* at 950–951, is cleverly true—because contemporary regulatory agencies have been allowed to perform adjudicative ("quasi-judicial") functions. See 5 U. S. C. § 554; *Humphrey's Executor* v. *United States,* 295 U. S. 602 (1935). It is foolish, however, to mistake the copy for the original, and to believe that 18th-century courts were imitating agencies, rather than 20th-century agencies imitating courts. The Act's requirement that the court appoint "three persons in the neighbourhood . . . most skilful in maritime affairs" to examine the ship and report on its condition certainly does not change the proceeding into one "supervised by a judge but otherwise more characteristic of executive activity," *post,* at 951; that requirement is not significantly different from the contemporary judicial practice of appointing expert witnesses, see, *e. g.,* Fed. Rule Evid. 706. The ultimate function of the judge under the Act was purely adjudicative; he was, after receiving the report, to "adjudge and determine . . . whether the said ship or vessel is fit to proceed on the intended voyage . . . ." 1 Stat. 132.

Not only do the enactments of the early Congresses, as far as we are aware, contain no evidence of an assumption that the Federal Government may command the States' executive power in the absence of a particularized constitutional authorization, they contain some indication of precisely the opposite assumption. On September 23, 1789—the day before its proposal of the Bill of Rights, see 1 Annals of Congress 912–913—the First Congress enacted a law aimed at obtaining state assistance of the most rudimentary and necessary sort for the enforcement of the new Government's laws: the holding of federal prisoners in state jails at federal expense. Significantly, the law issued not a command to the States' executive, but a recommendation to their legislatures. Congress "recommended to the legislatures of the several States to pass laws, making it expressly the duty of the keepers of their gaols, to receive and safe keep therein all prisoners committed under the authority of the United States," and offered to pay 50 cents per month for each prisoner. Act of Sept. 23, 1789, 1 Stat. 96. Moreover, when Georgia refused to comply with the request, see L. White, The Federalists 402 (1948), Congress's only reaction was a law authorizing the marshal in any State that failed to comply with the Recommendation of September 23, 1789, to rent a temporary jail until provision for a permanent one could be made, see Resolution of Mar. 3, 1791, 1 Stat. 225.

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[3] Article IV, § 2, cl. 2, provides:

> "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

To the extent the legislation went beyond the substantive requirement of this provision and specified procedures to be followed in complying with the constitutional obligation, we have found that that was an exercise of the congressional power to "prescribe the Manner in which such Acts, Records and Proceedings, shall be proved, and the Effect thereof," Art. IV, § 1. See *California* v. *Superior Court of Cal., San Bernardino Cty.*, 482 U. S. 400, 407 (1987).

In addition to early legislation, the Government also appeals to other sources we have usually regarded as indicative of the original understanding of the Constitution. It points to portions of The Federalist which reply to criticisms that Congress's power to tax will produce two sets of revenue officers—for example, "Brutus's" assertion in his letter to the New York Journal of December 13, 1787, that the Constitution "opens a door to the appointment of a swarm of revenue and excise officers to prey upon the honest and industrious part of the community, eat up their substance, and riot on the spoils of the country," reprinted in 1 Debate on the Constitution 502 (B. Bailyn ed. 1993). "Publius" responded that Congress will probably "make use of the State officers and State regulations, for collecting" federal taxes, The Federalist No. 36, p. 221 (C. Rossiter ed. 1961) (A. Hamilton) (hereinafter The Federalist), and predicted that "the eventual collection [of internal revenue] under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several States," *id.*, No. 45, at 292 (J. Madison). The Government also invokes The Federalist's more general observations that the Constitution would "enable the [national] government to employ the ordinary magistracy of each [State] in the execution of its laws," *id.*, No. 27, at 176 (A. Hamilton), and that it was "extremely probable that in other instances, particularly in the organization of the judicial power, the officers of the States will be clothed with the correspondent authority of the Union," *id.*, No. 45, at 292 (J. Madison). But none of these statements necessarily implies—what is the critical point here—that Congress could impose these responsibilities *without the consent of the States.* They appear to rest on the natural assumption that the States would consent to allowing their officials to assist the Federal Government, see *FERC* v. *Mississippi,* 456 U. S. 742, 796, n. 35 (1982) (O'CONNOR, J., concurring in judgment in part and dissenting in part), an assumption proved correct by the extensive mutual assistance the States and Federal Government voluntarily provided one another in the early days of the Republic, see generally White, *supra,* at 401–404, including voluntary *federal implementation of state law,* see, *e. g.,* Act of Apr. 2, 1790, ch. 5, § 1, 1 Stat. 106 (directing federal tax collectors and customs officers to assist in enforcing state inspection laws).

Another passage of The Federalist reads as follows:

> "It merits particular attention . . . that the laws of the Confederacy as to the *enumerated* and *legitimate* objects of its jurisdiction will become the SUPREME LAW of the land; to the observance of which all officers, legislative, executive, and judicial in each State will be bound by the sanctity of an oath. Thus, the legislatures, courts, and magistrates, of the respective members will be incorporated into the operations of the national government *as far as its just and constitutional authority extends;* and will be rendered auxiliary to the enforcement of its laws." The Federalist No. 27, at 177 (A. Hamilton) (emphasis in original).

The Government does not rely upon this passage, but JUSTICE SOUTER (with whose conclusions on this point the dissent is in agreement, see *post,* at 947–948) makes it the very foundation of his position; so we pause to examine it in some detail. JUSTICE SOUTER finds "[t]he natural reading" of the phrases "'will be incorporated into the operations of the national government'" and "'will be rendered auxiliary to the enforcement of its laws'" to be that the National Government will have "authority . . . , when exercising an otherwise legitimate power (the commerce power, say), to require state 'auxiliaries' to take appropriate action." *Post,* at 971, 975. There are several obstacles to such an interpretation. First, the consequences in question ("incorporated into the operations of the national government" and "rendered auxiliary to the enforcement of its laws") are said in the quoted passage to flow *automatically* from the officers' oath to observe "the laws of the Confederacy as to the *enumerated* and *legitimate* objects of its jurisdiction."[4] Thus, if the passage means that state officers must take an active role in the implementation of federal law, it means that they must do so without the necessity for a congressional directive that they implement it. But no one has ever thought, and no one asserts in the present litigation, that that is the law. The second problem with JUSTICE SOUTER's reading is that it makes state *legislatures* subject to federal direction. (The passage in question, after all, does not include legislatures merely incidentally, as by referring to "all state officers"; it refers to legislatures *specifically* and *first of all.*) We have held, however, that state legislatures are *not* subject to federal direction. *New York* v. *United States,* 505 U. S. 144 (1992).[5]

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[4] Both the dissent and JUSTICE SOUTER dispute that the consequences are said to flow automatically. They are wrong. The passage says that (1) federal laws will be supreme, and (2) all state officers will be oath-bound to observe those laws, and *thus* (3) state officers will be "incorporated" and "rendered auxiliary." The reason the progression is automatic is that there is *not* included between (2) and (3): "(2a) those laws will include laws compelling action by state officers." It is the mere existence of *all* federal laws that is said to make state officers "incorporated" and "auxiliary."

[5] JUSTICE SOUTER seeks to avoid incompatibility with *New York* (a decision which he joined and purports to adhere to), by saying, *post,* at 975, that the passage does not mean "any conceivable requirement may be imposed on any state official," and that "the essence of legislative power . . . is a discretion not subject to command," so that legislatures, at least, cannot be commanded. But then why were legislatures mentioned in the passage? It seems to us assuredly *not* a "natural reading" that being "rendered auxiliary to the enforcement of [the National Government's]

These problems are avoided, of course, if the calculatedly vague consequences the passage recites—"incorporated into the operations of the national government" and "rendered auxiliary to the enforcement of its laws"—are taken to refer to nothing more (or less) than the duty owed to the National Government, on the part of *all* state officials, to enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law, and the attendant reality that all state actions constituting such obstruction, even legislative Acts, are *ipso facto* invalid.[6] See *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 248 (1984) (federal pre-emption of conflicting state law). This meaning accords well with the context of the passage, which seeks to explain why the new system of federal law directed to individual citizens, unlike the old one of federal law directed to the States, will "bid much fairer to avoid the necessity of using force" against the States, The Federalist No. 27, at 176. It also reconciles the

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laws" means impressibility into federal service for "courts and magistrates" but something quite different for "legislatures." Moreover, the novel principle of political science that JUSTICE SOUTER invokes in order to bring forth disparity of outcome from parity of language—namely, that "the essence of legislative power . . . is a discretion not subject to command," *ibid.*—seems to us untrue. Perhaps legislatures are inherently uncommandable as to the outcome of their legislation, but they are commanded all the time as to what subjects they shall legislate upon—commanded, that is, by the people, in constitutional provisions that require, for example, the enactment of annual budgets or forbid the enactment of laws permitting gambling. We do not think that state legislatures would be betraying their very "essence" as legislatures (as opposed to their nature as sovereigns, a nature they share with the other two branches of Government) if they obeyed a federal command to enact laws, for example, criminalizing the sale of marijuana.

[6] If JUSTICE SOUTER finds these obligations too insignificant, see *post*, at 972–973, n. 1, then perhaps he should subscribe to the interpretations of "essential agency" given by Madison, see *infra*, at 914–915, and n. 8, or by Story, see n. 8, *infra*. The point is that there is *no* necessity to give the phrase the problematic meaning which alone enables him to use it as a basis for deciding this case.

passage with Hamilton's statement in The Federalist No. 36, at 222, that the Federal Government would in some circumstances do well "to employ the State officers as much as possible, and to attach them to the Union by an accumulation of their emoluments"—which surely suggests inducing state officers to come aboard by paying them, rather than merely commandeering their official services.[7]

JUSTICE SOUTER contends that his interpretation of The Federalist No. 27 is "supported by No. 44," written by Madison, wherefore he claims that "Madison and Hamilton" together stand opposed to our view. *Post*, at 971, 975. In fact, The Federalist No. 44 quite clearly contradicts JUSTICE SOUTER's reading. In that Number, Madison justifies the requirement that state officials take an oath to support the Federal Constitution on the ground that they "will have an essential agency in giving effect to the federal Constitution." If the dissent's reading of The Federalist No. 27 were correct (and if Madison agreed with it), one would surely have expected that "essential agency" of state executive officers (if described further) to be described as their responsibility to execute the laws enacted under the Constitution. Instead, however, The Federalist No. 44 continues with the following description:

> "The election of the President and Senate will depend, in all cases, on the legislatures of the several States. And the election of the House of Representatives will equally depend on the same authority in the first instance; and will, probably, forever *be conducted by the officers* and according to the laws *of the States.*" *Id.*, at 287 (emphasis added).

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[7] JUSTICE SOUTER deduces from this passage in No. 36 that although the Federal Government *may* commandeer state officers, it *must* compensate them for their services. This is a mighty leap, which would create a constitutional jurisprudence (for determining when the compensation was adequate) that would make takings cases appear clear and simple.

It is most implausible that the person who labored for that example of state executive officers' assisting the Federal Government believed, but neglected to mention, that they had a responsibility to execute federal laws.[8] If it was indeed Hamilton's view that the Federal Government could direct the officers of the States, that view has no clear support in Madison's writings, or as far as we are aware, in text, history, or early commentary elsewhere.[9]

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[8] JUSTICE SOUTER's discussion of this passage omits to mention that it *contains an example* of state executives' "essential agency"—and indeed implies the opposite by observing that "*other* numbers of The *Federalist* give examples" of the "essential agency" of state executive officers. *Post*, at 973 (emphasis added). In seeking to explain the curiousness of Madison's *not mentioning* the state executives' obligation to administer federal law, JUSTICE SOUTER says that in speaking of "an essential agency in giving effect to the federal Constitution," The Federalist No. 44, Madison "was not talking about executing congressional statutes; he was talking about putting the National Constitution into effect," *post*, at 973, n. 2. Quite so, which is our very point.

It is interesting to observe that Story's Commentaries on the Constitution, commenting upon the same issue of why state officials are required by oath to support the Constitution, uses the same "essential agency" language as Madison did in The Federalist No. 44, and goes on to give more numerous examples of state executive agency than Madison did; all of them, however, involve not state administration of federal law, but merely the implementation of duties imposed on state officers by the Constitution itself: "The executive authority of the several states may be often called upon to exert Powers or allow Rights given by the Constitution, as in filling vacancies in the senate during the recess of the legislature; in issuing writs of election to fill vacancies in the house of representatives; in officering the militia, and giving effect to laws for calling them; and in the surrender of fugitives from justice." 2 Story, Commentaries on the Constitution of the United States 577 (1851).

[9] Even if we agreed with JUSTICE SOUTER's reading of The Federalist No. 27, it would still seem to us most peculiar to give the view expressed in that one piece, not clearly confirmed by any other writer, the determinative weight he does. That would be crediting the most expansive view of federal authority ever expressed, and from the pen of the most expansive expositor of federal power. Hamilton was "from first to last the most nationalistic of all nationalists in his interpretation of the clauses of our

To complete the historical record, we must note that there is not only an absence of executive-commandeering statutes in the early Congresses, but there is an absence of them in our later history as well, at least until very recent years. The Government points to the Act of August 3, 1882, ch. 376, §§2, 4, 22 Stat. 214, which enlisted state officials "to take charge of the local affairs of immigration in the ports within such State, and to provide for the support and relief of such immigrants therein landing as may fall into distress or need of public aid"; to inspect arriving immigrants and exclude any person found to be a "convict, lunatic, idiot," or indigent; and to send convicts back to their country of origin "without compensation." The statute did not, however, *mandate* those duties, but merely empowered the Secretary of the Treasury "to *enter into contracts* with such State . . . officers as *may be designated* for that purpose *by the governor* of any State." (Emphasis added.)

The Government cites the World War I selective draft law that authorized the President "to utilize the service of any or all departments and any or all officers or agents of the United States *and of the several States*, Territories, and the District of Columbia, and subdivisions thereof, in the execution of this Act," and made any person who refused to comply

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federal Constitution." C. Rossiter, Alexander Hamilton and the Constitution 199 (1964). More specifically, it is widely recognized that "The Federalist reads with a split personality" on matters of federalism. See D. Braveman, W. Banks, & R. Smolla, Constitutional Law: Structure and Rights in Our Federal System 198–199 (3d ed. 1996). While overall The Federalist reflects a "large area of agreement between Hamilton and Madison," Rossiter, *supra*, at 58, that is not the case with respect to the subject at hand, see Braveman, *supra*, at 198–199. To choose Hamilton's view, as JUSTICE SOUTER would, is to turn a blind eye to the fact that it was Madison's—not Hamilton's—that prevailed, not only at the Constitutional Convention and in popular sentiment, see Rossiter, *supra*, at 44–47, 194, 196; 1 Records of the Federal Convention 366 (M. Farrand ed. 1911), but in the subsequent struggle to fix the meaning of the Constitution by early congressional practice, see *supra*, at 905–910.

with the President's directions guilty of a misdemeanor. Act of May 18, 1917, ch. 15, § 6, 40 Stat. 80–81 (emphasis added). However, it is far from clear that the authorization "to utilize the service" of state officers was an authorization to *compel* the service of state officers; and the misdemeanor provision surely applied only to refusal to comply with the President's *authorized* directions, which might not have included directions to officers of States whose Governors had not volunteered their services. It is interesting that in implementing the Act President Wilson did not commandeer the services of state officers, but instead requested the assistance of the States' Governors, see Proclamation of May 18, 1917, 40 Stat. 1665 ("call[ing] upon the Governor of each of the several States . . . and all officers and agents of the several States . . . to perform certain duties"); Registration Regulations Prescribed by the President Under the Act of Congress Approved May 18, 1917, pt. 1, § 7 ("[T]he governor [of each State] is *requested* to act under the regulations and rules prescribed by the President or under his direction" (emphasis added)), obtained the consent of each of the Governors, see Note, The President, the Senate, the Constitution, and the Executive Order of May 8, 1926, 21 Ill. L. Rev. 142, 144 (1926), and left it to the Governors to issue orders to their subordinate state officers, see Selective Service Regulations Prescribed by the President Under the Act of May 18, 1917, § 27 (1918); J. Clark, The Rise of a New Federalism 91 (1965). See generally Note, 21 Ill. L. Rev., at 144. It is impressive that even with respect to a wartime measure the President should have been so solicitous of state independence.

The Government points to a number of federal statutes enacted within the past few decades that require the participation of state or local officials in implementing federal regulatory schemes. Some of these are connected to federal funding measures, and can perhaps be more accurately described as conditions upon the grant of federal funding than as mandates to the States; others, which require only the provision of information to the Federal Government, do not involve the precise issue before us here, which is the forced participation of the States' executive in the actual administration of a federal program. We of course do not address these or other currently operative enactments that are not before us; it will be time enough to do so if and when their validity is challenged in a proper case. For deciding the issue before us here, they are of little relevance. Even assuming they represent assertion of the very same congressional power challenged here, they are of such recent vintage that they are no more probative than the statute before us of a constitutional tradition that lends meaning to the text. Their persuasive force is far outweighed by almost two centuries of apparent congressional avoidance of the practice. Compare *INS* v. *Chadha*, 462 U. S. 919 (1983), in which the legislative veto, though enshrined in perhaps hundreds of federal statutes, most of which were enacted in the 1970's and the earliest of which was enacted in 1932, see *id.*, at 967–975 (White, J., dissenting), was nonetheless held unconstitutional.

III

The constitutional practice we have examined above tends to negate the existence of the congressional power asserted here, but is not conclusive. We turn next to consideration of the structure of the Constitution, to see if we can discern among its "essential postulate[s]," *Principality of Monaco* v. *Mississippi*, 292 U. S. 313, 322 (1934), a principle that controls the present cases.

A

It is incontestible that the Constitution established a system of "dual sovereignty." *Gregory* v. *Ashcroft*, 501 U. S. 452, 457 (1991); *Tafflin* v. *Levitt*, 493 U. S. 455, 458 (1990). Although the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty," The Federalist No. 39, at 245 (J. Madison). This is reflected throughout the Constitution's text, *Lane County* v. *Oregon*, 7 Wall. 71, 76 (1869); *Texas* v. *White*, 7 Wall. 700, 725 (1869), including (to mention only a few examples) the prohibition on any involuntary reduction or combination of a State's territory, Art. IV, § 3; the Judicial Power Clause, Art. III, § 2, and the Privileges and Immunities Clause, Art. IV, § 2, which speak of the "Citizens" of the States; the amendment provision, Article V, which requires the votes of three-fourths of the States to amend the Constitution; and the Guarantee Clause, Art. IV, § 4, which "presupposes the continued existence of the states and . . . those means and instrumentalities which are the creation of their sovereign and reserved rights," *Helvering* v. *Gerhardt*, 304 U. S. 405, 414–415 (1938). Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict. See The Federalist No. 15. Preservation of the States as independent political entities being the price of union, and "[t]he practicality of making laws, with coercive sanctions, for the States as political bodies" having been, in Madison's words, "exploded on all hands," 2 Records of the Federal Convention of 1787, p. 9 (M. Farrand ed. 1911), the Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and

Federal Governments would exercise concurrent authority over the people—who were, in Hamilton's words, "the only proper objects of government," The Federalist No. 15, at 109. We have set forth the historical record in more detail elsewhere, see *New York* v. *United States*, 505 U. S., at 161–166, and need not repeat it here. It suffices to repeat the conclusion: "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Id.*, at 166.[10] The great innovation of this design was that "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other"—"a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 838 (1995) (KENNEDY, J., concurring). The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens. See *New York*, *supra*, at 168–169; *United States* v. *Lopez*, 514 U. S. 549, 576–577 (1995) (KENNEDY, J., concurring). Cf. *Edgar* v. *MITE Corp.*, 457 U. S. 624, 644 (1982) ("[T]he State has no legitimate interest in protecting nonresident[s]"). As Madison expressed it: "[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." The Federalist No. 39, at 245.[11]

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[10] The dissent, reiterating JUSTICE STEVENS's dissent in *New York*, 505 U. S., at 210–213, maintains that the Constitution merely *augmented* the pre-existing power under the Articles to issue commands to the States with the additional power to make demands directly on individuals. See *post*, at 945. That argument, however, was squarely rejected by the Court in *New York*, *supra*, at 161–166, and with good reason. Many of Congress's powers under Art. I, §8, were copied almost verbatim from the Articles of Confederation, indicating quite clearly that "[w]here the Constitution intends that our Congress enjoy a power once vested in the Continental Congress, it specifically grants it." Prakash, Field Office Federalism, 79 Va. L. Rev. 1957, 1972 (1993).

This separation of the two spheres is one of the Constitution's structural protections of liberty. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory*, 501 U. S., at 458. To quote Madison once again:

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[11] JUSTICE BREYER's dissent would have us consider the benefits that other countries, and the European Union, believe they have derived from federal systems that are different from ours. We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one. The Framers were familiar with many federal systems, from classical antiquity down to their own time; they are discussed in Nos. 18–20 of The Federalist. Some were (for the purpose here under discussion) quite similar to the modern "federal" systems that JUSTICE BREYER favors. Madison's and Hamilton's opinion of such systems could not be clearer. The Federalist No. 20, after an extended critique of the system of government established by the Union of Utrecht for the United Netherlands, concludes:

> "I make no apology for having dwelt so long on the contemplation of these federal precedents. Experience is the oracle of truth; and where its responses are unequivocal, they ought to be conclusive and sacred. The important truth, which it unequivocally pronounces in the present case, is that a sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity . . . ." *Id.*, at 138.

Antifederalists, on the other hand, pointed specifically to Switzerland—and its then-400 years of success as a "confederate republic"—as proof that the proposed Constitution and its federal structure was unnecessary. See Patrick Henry, Speeches given before the Virginia Ratifying Convention, 4 and 5 June, 1788, reprinted in The Essential Antifederalist 123, 135–136 (W. Allen & G. Lloyd ed. 1985). The fact is that our federalism is not Europe's. It is "the unique contribution of the Framers to political science and political theory." *United States* v. *Lopez*, 514 U. S. 549, 575 (1995) (KENNEDY, J., concurring) (citing Friendly, Federalism: A Forward, 86 Yale L. J. 1019 (1977)).

> "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." The Federalist No. 51, at 323.

See also The Federalist No. 28, at 180–181 (A. Hamilton). The power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States.

B

We have thus far discussed the effect that federal control of state officers would have upon the first element of the "double security" alluded to by Madison: the division of power between State and Federal Governments. It would also have an effect upon the second element: the separation and equilibration of powers between the three branches of the Federal Government itself. The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, "shall take Care that the Laws be faithfully executed," Art. II, § 3, personally and through officers whom he appoints (save for such inferior officers as Congress may authorize to be appointed by the "Courts of Law" or by "the Heads of Departments" who are themselves Presidential appointees), Art. II, § 2. The Brady Act effectively transfers this responsibility to thousands of CLEOs in the 50 States, who are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove). The insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known. See The Federalist No. 70 (A. Hamilton); 2 Documentary History of the Ratification of the Constitution 495 (M. Jensen ed. 1976) (statement of James Wilson); see also Calabresi & Prakash, The President's Power to Execute the Laws, 104 Yale L. J. 541 (1994). That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.[12]

C

The dissent of course resorts to the last, best hope of those who defend ultra vires congressional action, the Necessary and Proper Clause. It reasons, *post,* at 941, that the power to regulate the sale of handguns under the Commerce Clause, coupled with the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers," Art. I, §8, conclusively establishes the Brady Act's constitutional validity, because the Tenth Amendment imposes no limitations on the exercise of *delegated* powers but merely prohibits the exercise of powers "*not* delegated to the United States." What destroys the dissent's Necessary and Proper Clause argument, however, is not the Tenth Amendment but the Necessary and Proper Clause itself.[13] When a "La[w] . . . for carrying into Execution" the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier, *supra,* at 919, it is not a "La[w] . . . *proper* for carrying into Execution the Commerce Clause," and is thus, in the words of The Federalist, "merely [an] ac[t] of usurpation" which "deserve[s] to be treated as such." The Federalist No. 33, at 204 (A. Hamilton). See Lawson & Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke L. J. 267, 297–326, 330–333 (1993). We in fact answered the dissent's Necessary and Proper Clause argument in *New York:* "[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. . . . [T]he Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." 505 U. S., at 166.

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[12] There is not, as the dissent believes, *post,* at 960, "tension" between the proposition that impressing state police officers into federal service will massively augment *federal* power, and the proposition that it will also sap the power of the Federal *Presidency.* It is quite possible to have a more powerful Federal Government that is, by reason of the destruction of its Executive unity, a less efficient one. The dissent is correct, *post,* at 959–960, that control by the unitary Federal Executive is also sacrificed when States voluntarily administer federal programs, but the condition of voluntary state participation significantly reduces the ability of Congress to use this device as a means of reducing the power of the Presidency.

[13] This argument also falsely presumes that the Tenth Amendment is the exclusive textual source of protection for principles of federalism. Our system of dual sovereignty is reflected in numerous constitutional provisions, see *supra,* at 919, and not only those, like the Tenth Amendment, that speak to the point explicitly. It is not at all unusual for our

The dissent perceives a simple answer in that portion of Article VI which requires that "all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution," arguing that by virtue of the Supremacy Clause this makes "not only the Constitution, but every law enacted by Congress as well," binding on state officers, including laws requiring state-officer enforcement. *Post,* at 944. The Supremacy Clause, however, makes "Law of the Land" only "Laws of the United States which shall be made in Pursuance [of the Constitution]," Art. VI, cl. 2, so the Supremacy

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resolution of a significant constitutional question to rest upon reasonable implications. See, *e. g., Myers* v. *United States,* 272 U. S. 52 (1926) (finding by implication from Art. II, §§1, 2, that the President has the exclusive power to remove executive officers); *Plaut* v. *Spendthrift Farm, Inc.,* 514 U. S. 211 (1995) (finding that Article III implies a lack of congressional power to set aside final judgments).

Clause merely brings us back to the question discussed earlier, whether laws conscripting state officers violate state sovereignty and are thus not in accord with the Constitution.

IV

Finally, and most conclusively in the present litigation, we turn to the prior jurisprudence of this Court. Federal commandeering of state governments is such a novel phenomenon that this Court's first experience with it did not occur until the 1970's, when the Environmental Protection Agency promulgated regulations requiring States to prescribe auto emissions testing, monitoring and retrofit programs, and to designate preferential bus and carpool lanes. The Courts of Appeals for the Fourth and Ninth Circuits invalidated the regulations on statutory grounds in order to avoid what they perceived to be grave constitutional issues, see *Maryland* v. *EPA*, 530 F. 2d 215, 226 (CA4 1975); *Brown* v. *EPA*, 521 F. 2d 827, 838–842 (CA9 1975); and the District of Columbia Circuit invalidated the regulations on both constitutional and statutory grounds, see *District of Columbia* v. *Train*, 521 F. 2d 971, 994 (1975). After we granted certiorari to review the statutory and constitutional validity of the regulations, the Government declined even to defend them, and instead rescinded some and conceded the invalidity of those that remained, leading us to vacate the opinions below and remand for consideration of mootness. *EPA* v. *Brown*, 431 U. S. 99 (1977) *(per curiam)*.

Although we had no occasion to pass upon the subject in *Brown*, later opinions of ours have made clear that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs. In *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264 (1981), and *FERC* v. *Mississippi*, 456 U. S. 742 (1982), we sustained statutes against constitutional challenge only after assuring ourselves that they did not require the States to enforce federal law. In

Hodel we cited the lower court cases in *EPA* v. *Brown, supra,* but concluded that the Surface Mining Control and Reclamation Act of 1977 did not present the problem they raised because it merely made compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field, *Hodel, supra,* at 288. In *FERC,* we construed the most troubling provisions of the Public Utility Regulatory Policies Act of 1978 to contain only the "command" that state agencies "consider" federal standards, and again only as a precondition to continued state regulation of an otherwise pre-empted field. 456 U. S., at 764–765. We warned that "this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations," *id.,* at 761–762.

When we were at last confronted squarely with a federal statute that unambiguously required the States to enact or administer a federal regulatory program, our decision should have come as no surprise. At issue in *New York* v. *United States,* 505 U. S. 144 (1992), were the so-called "take title" provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, which required States either to enact legislation providing for the disposal of radioactive waste generated within their borders, or to take title to, and possession of, the waste—effectively requiring the States either to legislate pursuant to Congress's directions, or to implement an administrative solution. *Id.,* at 175–176. We concluded that Congress could constitutionally require the States to do neither. *Id.,* at 176. "The Federal Government," we held, "may not compel the States to enact or administer a federal regulatory program." *Id.,* at 188.

The Government contends that *New York* is distinguishable on the following ground: Unlike the "take title" provisions invalidated there, the background-check provision of the Brady Act does not require state legislative or executive officials to make policy, but instead issues a final directive to state CLEOs. It is permissible, the Government asserts, for Congress to command state or local officials to assist in the implementation of federal law so long as "Congress itself devises a clear legislative solution that regulates private conduct" and requires state or local officers to provide only "limited, non-policymaking help in enforcing that law." "[T]he constitutional line is crossed only when Congress compels the States to make law in their sovereign capacities." Brief for United States 16.

The Government's distinction between "making" law and merely "enforcing" it, between "policymaking" and mere "implementation," is an interesting one. It is perhaps not meant to be the same as, but it is surely reminiscent of, the line that separates proper congressional conferral of Executive power from unconstitutional delegation of legislative authority for federal separation-of-powers purposes. See *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 530 (1935); *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 428–429 (1935). This Court has not been notably successful in describing the latter line; indeed, some think we have abandoned the effort to do so. See *FPC* v. *New England Power Co.*, 415 U. S. 345, 352–353 (1974) (Marshall, J., concurring in result); Schoenbrod, The Delegation Doctrine: Could the Court Give it Substance?, 83 Mich. L. Rev. 1223, 1233 (1985). We are doubtful that the new line the Government proposes would be any more distinct. Executive action that has utterly no policymaking component is rare, particularly at an executive level as high as a jurisdiction's chief law enforcement officer. Is it really true that there is no policymaking involved in deciding, for example, what "reasonable efforts" shall be expended to conduct a background check? It may well satisfy the Act for a CLEO to direct that (a) no background checks will be conducted that divert personnel time from pending felony investigations, and (b) no background check will be permitted to consume more than one-half hour of an officer's time. But nothing in the Act *requires* a CLEO to be so parsimonious; diverting at least *some* felony-investigation time, and permitting at least *some* background checks beyond one-half hour would certainly not be *un*reasonable. Is this decision whether to devote maximum "reasonable efforts" or minimum "reasonable efforts" not preeminently a matter of policy? It is quite impossible, in short, to draw the Government's proposed line at "no policymaking," and we would have to fall back upon a line of "not too much policymaking." How much is too much is not likely to be answered precisely; and an imprecise barrier against federal intrusion upon state authority is not likely to be an effective one.

Even assuming, moreover, that the Brady Act leaves no "policymaking" discretion with the States, we fail to see how that improves rather than worsens the intrusion upon state sovereignty. Preservation of the States as independent and autonomous political entities is arguably less undermined by requiring them to make policy in certain fields than (as Judge Sneed aptly described it over two decades ago) by "reduc[ing] [them] to puppets of a ventriloquist Congress," *Brown* v. *EPA*, 521 F. 2d, at 839. It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority. See *Texas* v. *White*, 7 Wall., at 725. It is no more compatible with this independence and autonomy that their officers be "dragooned" (as Judge Fernandez put it in his dissent below, 66 F. 3d, at 1035) into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.

The Government purports to find support for its proffered distinction of *New York* in our decisions in *Testa* v. *Katt*, 330 U. S. 386 (1947), and *FERC* v. *Mississippi*, 456 U. S. 742 (1982). We find neither case relevant. *Testa* stands for the proposition that state courts cannot refuse to apply federal law—a conclusion mandated by the terms of the Supremacy Clause ("the Judges in every State shall be bound [by federal law]"). As we have suggested earlier, *supra*, at 907, that says nothing about whether state executive officers must administer federal law. Accord, *New York*, 505 U. S., at 178–179. As for *FERC*, it stated (as we have described earlier) that "this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations," 456 U. S., at 761–762, and upheld the statutory provisions at issue precisely because they did *not* commandeer state government, but merely imposed preconditions to continued state regulation of an otherwise pre-empted field, in accord with *Hodel*, 452 U. S., at 288, and required state administrative agencies to apply federal law while acting in a judicial capacity, in accord with *Testa*, see *FERC*, *supra*, at 759–771, and n. 24.[14]

The Government also maintains that requiring state officers to perform discrete, ministerial tasks specified by Congress does not violate the principle of *New York* because it does not diminish the accountability of state or federal officials. This argument fails even on its own terms. By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects. See Merritt, Three Faces of Federalism: Finding a Formula for the Future, 47 Vand. L. Rev. 1563, 1580, n. 65 (1994). Under the present law, for example, it will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun. And it will likely be the CLEO, not some federal official, who will be blamed for any error (even one in the designated federal database) that causes a purchaser to be mistakenly rejected.

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[14] The dissent points out that *FERC* cannot be construed as merely following the principle recognized in *Testa* that state courts must apply relevant federal law because "[a]lthough the commission was serving an adjudicative function, the commissioners were unquestionably not 'judges' within the meaning of [the Supremacy Clause]." *Post*, at 969. That is true enough. But the answer to the question of which state officers *must* apply federal law (only "'judges' within the meaning of [the Supremacy Clause]") is different from the answer to the question of which state officers *may be required by statute* to apply federal law (officers who conduct adjudications similar to those traditionally performed by judges). It is within the power of the States, as it is within the power of the Federal Government, see *Crowell* v. *Benson*, 285 U. S. 22 (1932), to transfer some adjudicatory functions to administrative agencies, with opportunity for subsequent judicial review. But it is also within the power of Congress to prescribe, explicitly or by implication (as in the legislation at issue in *FERC*), that those adjudications must take account of federal law. The existence of this latter power should not be unacceptable to a dissent that believes distinguishing among officers on the basis of their title rather than the function they perform is "empty formalistic reasoning of the highest order," *post*, at 952. We have no doubt that *FERC* would not have been decided the way it was if *non*adjudicative responsibilities of the state agency were at issue.

The dissent makes no attempt to defend the Government's basis for distinguishing *New York*, but instead advances what seems to us an even more implausible theory. The Brady Act, the dissent asserts, is different from the "take title" provisions invalidated in *New York* because the former is addressed to individuals—namely, CLEOs—while the latter were directed to the State itself. That is certainly a difference, but it cannot be a constitutionally significant one. While the Brady Act is directed to "individuals," it is directed to them in their official capacities as state officers; it controls their actions, not as private citizens, but as the agents of the State. The distinction between judicial writs and other government action directed against individuals in their personal capacity, on the one hand, and in their official capacity, on the other hand, is an ancient one, principally because it is dictated by common sense. We have observed that "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. . . . As such, it is no different from a suit against the State itself." *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 71 (1989). And the same must be said of a directive to an official in his or her official capacity. To say that the Federal Government cannot control the State, but can control all of its officers, is to say nothing of significance.[15] Indeed, it merits the description "empty formalistic reasoning of the highest order," *post*, at 952. By resorting to this, the dissent not so much distinguishes *New York* as disembowels it.[16]

Finally, the Government puts forward a cluster of arguments that can be grouped under the heading: "The Brady Act serves very important purposes, is most efficiently administered by CLEOs during the interim period, and places a minimal and only temporary burden upon state officers." There is considerable disagreement over the extent of the burden, but we need not pause over that detail. Assuming *all* the mentioned factors were true, they might be relevant if we were evaluating whether the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments. See, *e. g., Fry* v. *United States,* 421 U. S. 542, 548 (1975); *National League of Cities* v. *Usery,* 426 U. S. 833, 853 (1976) (overruled by *Garcia* v. *San Antonio Metropolitan Transit Authority,* 469 U. S. 528 (1985)); *South Carolina* v. *Baker,* 485 U. S. 505, 529 (1988) (REHNQUIST, C. J., concurring in judgment). But where, as here, it is the whole *object* of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a "balancing" analysis is inappropriate.[17] It is the very *principle* of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect. Cf. *Bowsher,* 478 U. S., at 736 (declining to subject principle of separation of powers to a balancing test); *Chadha,* 462 U. S., at 944–946 (same); *Plaut* v. *Spendthrift Farm, Inc.,* 514 U. S.

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[15] Contrary to the dissent's suggestion, *post*, at 955–956, n. 16, and 965, the distinction in our Eleventh Amendment jurisprudence between States and municipalities is of no relevance here. We long ago made clear that the distinction is peculiar to the question of whether a governmental entity is entitled to Eleventh Amendment sovereign immunity, see *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 690, n. 55 (1978); we have refused to apply it to the question of whether a governmental entity is protected by the Constitution's guarantees of federalism, including the Tenth Amendment, see *National League of Cities* v. *Usery*, 426 U. S. 833, 855–856, n. 20 (1976) (overruled on other grounds by *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985)); see also *Garcia*, *supra* (resolving Tenth Amendment issues in suit brought by local transit authority).

[16] The dissent's suggestion, *post*, at 964, n. 27, that *New York* v. *United States*, 505 U. S. 144 (1992), itself embraced the distinction between congressional control of States (impermissible) and congressional control of state officers (permissible) is based upon the most egregious wrenching of statements out of context. It would take too much to reconstruct the context here, but by examining the entire passage cited, *id.*, at 178–179, the reader will readily perceive the distortion. The passage includes, for example, the following:

> "Additional cases cited by the United States discuss the power of federal *courts* to order state officials to comply with federal law. . . . Again, however, the text of the Constitution plainly confers this authority on the federal courts . . . . The Constitution contains no analogous grant of authority to Congress." *Id.*, at 179.

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[17] The dissent observes that "Congress could require private persons, such as hospital executives or school administrators, to provide arms merchants with relevant information about a prospective purchaser's fitness to own a weapon," and that "the burden on police officers [imposed by the Brady Act] would be permissible if a similar burden were also imposed on private parties with access to relevant data." *Post,* at 961. That is undoubtedly true, but it does not advance the dissent's case. The Brady Act does not merely require CLEOs to report information in their private possession. It requires them to provide information that belongs to the State and is available to them only in their official capacity; and to conduct investigation in their official capacity, by examining databases and records that only state officials have access to. In other words, the suggestion that extension of this statute to private citizens would eliminate the constitutional problem posits the impossible.

211, 239–240 (1995) (holding legislated invalidation of final judgments to be categorically unconstitutional). We expressly rejected such an approach in *New York*, and what we said bears repeating:

> "Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear 'formalistic' in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." 505 U. S., at 187.

We adhere to that principle today, and conclude categorically, as we concluded categorically in *New York:* "The Federal Government may not compel the States to enact or administer a federal regulatory program." *Id.*, at 188. The mandatory obligation imposed on CLEOs to perform background checks on prospective handgun purchasers plainly runs afoul of that rule.

V

What we have said makes it clear enough that the central obligation imposed upon CLEOs by the interim provisions of the Brady Act—the obligation to "make a reasonable effort to ascertain within 5 business days whether receipt or possession [of a handgun] would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General," 18 U. S. C. § 922(s)(2)—is unconstitutional. Extinguished with it, of course, is the duty implicit in the background-check requirement that the CLEO accept notice of the contents of, and a copy of, the completed Brady

Form, which the firearms dealer is required to provide to him, §§ 922(s)(1)(A)(i)(III) and (IV).

Petitioners also challenge, however, two other provisions of the Act: (1) the requirement that any CLEO "to whom a [Brady Form] is transmitted" destroy the form and any record containing information derived from it, § 922(s)(6)(B)(i), and (2) the requirement that any CLEO who "determines that an individual is ineligible to receive a handgun" provide the would-be purchaser, upon request, a written statement of the reasons for that determination, § 922(s)(6)(C). With the background-check and implicit receipt-of-forms requirements invalidated, however, these provisions require no action whatsoever on the part of the CLEO. Quite obviously, the obligation to destroy all Brady Forms that he has received when he has received none, and the obligation to give reasons for a determination of ineligibility when he never makes a determination of ineligibility, are no obligations at all. These two provisions have conceivable application to a CLEO, in other words, only if he has chosen, voluntarily, to participate in administration of the federal scheme. The present petitioners are not in that position.[18] As to them, these last two challenged provisions are not unconstitutional, but simply inoperative.

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[18] We note, in this regard, that both CLEOs before us here assert that they are prohibited from taking on these federal responsibilities under state law. That assertion is clearly correct with regard to Montana law, which expressly enjoins any "county . . . or other local government unit" from "prohibit[ing] . . . or regulat[ing] the purchase, sale or other transfer (including delay in purchase, sale, or other transfer), ownership, [or] possession . . . of any . . . handgun," Mont. Code Ann. § 45–8–351(1) (1995). It is arguably correct with regard to Arizona law as well, which states that "[a] political subdivision of this state shall not . . . prohibit the ownership, purchase, sale or transfer of firearms," Ariz. Rev. Stat. Ann. § 13–3108(B) (1989). We need not resolve that question today; it is at least clear that Montana and Arizona do not require their CLEOs to implement the Brady Act, and CLEOs Printz and Mack have chosen not to do so.

There is involved in this Brady Act conundrum a severability question, which the parties have briefed and argued: whether firearms dealers in the jurisdictions at issue here, and in other jurisdictions, remain obliged to forward to the CLEO (even if he will not accept it) the requisite notice of the contents (and a copy) of the Brady Form, §§ 922(s)(1)(A)(i)(III) and (IV); and to wait five business days before consummating the sale, § 922(s)(1)(A)(ii). These are important questions, but we have no business answering them in these cases. These provisions burden only firearms dealers and purchasers, and no plaintiff in either of those categories is before us here. We decline to speculate regarding the rights and obligations of parties not before the Court. Cf., *e. g., New York, supra,* at 186–187 (addressing severability where remaining provisions at issue affected the plaintiffs).

* * *

We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States' officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty. Accordingly, the judgment of the Court of Appeals for the Ninth Circuit is reversed.

It is so ordered.

JUSTICE O'CONNOR, concurring.

Our precedent and our Nation's historical practices support the Court's holding today. The Brady Act violates the

Tenth Amendment to the extent it forces States and local law enforcement officers to perform background checks on prospective handgun owners and to accept Brady Forms from firearms dealers. See *ante*, at 922. Our holding, of course, does not spell the end of the objectives of the Brady Act. States and chief law enforcement officers may voluntarily continue to participate in the federal program. Moreover, the directives to the States are merely interim provisions scheduled to terminate November 30, 1998. Note following 18 U. S. C. § 922. Congress is also free to amend the interim program to provide for its continuance on a contractual basis with the States if it wishes, as it does with a number of other federal programs. See, *e. g.*, 23 U. S. C. § 402 (conditioning States' receipt of federal funds for highway safety program on compliance with federal requirements).

In addition, the Court appropriately refrains from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid. See, *e. g.*, 42 U. S. C. § 5779(a) (requiring state and local law enforcement agencies to report cases of missing children to the Department of Justice). The provisions invalidated here, however, which directly compel state officials to administer a federal regulatory program, utterly fail to adhere to the design and structure of our constitutional scheme.

JUSTICE THOMAS, concurring.

The Court today properly holds that the Brady Act violates the Tenth Amendment in that it compels state law enforcement officers to "administer or enforce a federal regulatory program." See *ante*, at 935. Although I join the Court's opinion in full, I write separately to emphasize that the Tenth Amendment affirms the undeniable notion that under our Constitution, the Federal Government is one of enumerated, hence limited, powers. See, *e. g.*, *McCulloch* v.

Maryland, 4 Wheat. 316, 405 (1819) ("This government is acknowledged by all to be one of enumerated powers"). "[T]hat those limits may not be mistaken, or forgotten, the constitution is written." *Marbury* v. *Madison,* 1 Cranch 137, 176 (1803). Accordingly, the Federal Government may act only where the Constitution authorizes it to do so. Cf. *New York* v. *United States,* 505 U. S. 144 (1992).

In my "revisionist" view, see *post,* at 941 (STEVENS, J., dissenting), the Federal Government's authority under the Commerce Clause, which merely allocates to Congress the power "to regulate Commerce . . . among the several States," does not extend to the regulation of wholly *intra*state, point-of-sale transactions. See *United States* v. *Lopez,* 514 U. S. 549, 584 (1995) (concurring opinion). Absent the underlying authority to regulate the intrastate transfer of firearms, Congress surely lacks the corollary power to impress state law enforcement officers into administering and enforcing such regulations. Although this Court has long interpreted the Constitution as ceding Congress extensive authority to regulate commerce (interstate or otherwise), I continue to believe that we must "temper our Commerce Clause jurisprudence" and return to an interpretation better rooted in the Clause's original understanding. *Id.,* at 601 (concurring opinion); see also *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison,* 520 U. S. 564, 620 (1997) (THOMAS, J., dissenting).

Even if we construe Congress' authority to regulate interstate commerce to encompass those intrastate transactions that "substantially affect" interstate commerce, I question whether Congress can regulate the particular transactions at issue here. The Constitution, in addition to delegating certain enumerated powers to Congress, places whole areas outside the reach of Congress' regulatory authority. The First Amendment, for example, is fittingly celebrated for preventing Congress from "prohibiting the free exercise" of religion or "abridging the freedom of speech." The Second

Amendment similarly appears to contain an express limitation on the Government's authority. That Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." This Court has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment.[1] If, however, the Second Amendment is read to confer a *personal* right to "keep and bear arms," a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections.[2] As the parties did not raise this argument, however, we need not consider it here. Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms "has justly been considered, as the palladium of the liberties of a republic." 3 J. Story, Commentaries § 1890, p. 746 (1833). In the meantime, I join the Court's opinion striking down the challenged provisions of the Brady Act as inconsistent with the Tenth Amendment.

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[1] Our most recent treatment of the Second Amendment occurred in *United States* v. *Miller,* 307 U. S. 174 (1939), in which we reversed the District Court's invalidation of the National Firearms Act, enacted in 1934. In *Miller,* we determined that the Second Amendment did not guarantee a citizen's right to possess a sawed-off shotgun because that weapon had not been shown to be "ordinary military equipment" that could "contribute to the common defense." *Id.,* at 178. The Court did not, however, attempt to define, or otherwise construe, the substantive right protected by the Second Amendment.

[2] Marshaling an impressive array of historical evidence, a growing body of scholarly commentary indicates that the "right to keep and bear arms" is, as the Amendment's text suggests, a personal right. See, *e. g.,* J. Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right 162 (1994); S. Halbrook, That Every Man Be Armed, The Evolution of a Constitutional Right (1984); Van Alstyne, The Second Amendment and the Personal Right to Arms, 43 Duke L. J. 1236 (1994); Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L. J. 1193 (1992); Cottrol & Diamond, The Second Amendment: Toward an Afro-Americanist Reconsideration, 80 Geo. L. J. 309 (1991); Levinson, The Embarrassing Second Amendment, 99 Yale L. J. 637 (1989); Kates, Handgun Prohibition and the Original Meaning of the Second Amendment, 82 Mich. L. Rev. 204 (1983). Other scholars, however, argue that the Second Amendment does not secure a personal right to keep or to bear arms. See, *e. g.,* Bogus, Race, Riots, and Guns, 66 S. Cal. L. Rev. 1365 (1993); Williams, Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment, 101 Yale L. J. 551 (1991); Brown, Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment, 99 Yale L. J. 661 (1989); Cress, An Armed Community: The

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

When Congress exercises the powers delegated to it by the Constitution, it may impose affirmative obligations on executive and judicial officers of state and local governments as well as ordinary citizens. This conclusion is firmly supported by the text of the Constitution, the early history of the Nation, decisions of this Court, and a correct understanding of the basic structure of the Federal Government.

These cases do not implicate the more difficult questions associated with congressional coercion of state legislatures addressed in *New York* v. *United States*, 505 U. S. 144 (1992). Nor need we consider the wisdom of relying on local officials rather than federal agents to carry out aspects of a federal program, or even the question whether such officials may be required to perform a federal function on a permanent basis. The question is whether Congress, acting on behalf of the people of the entire Nation, may require local law enforcement officers to perform certain duties during the interim needed for the development of a federal gun control program. It is remarkably similar to the question, heavily debated by the Framers of the Constitution, whether Congress could require state agents to collect federal taxes. Or the question

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Origins and Meaning of the Right to Bear Arms, 71 J. Am. Hist. 22 (1984). Although somewhat overlooked in our jurisprudence, the Amendment has certainly engendered considerable academic, as well as public, debate.

whether Congress could impress state judges into federal service to entertain and decide cases that they would prefer to ignore.

Indeed, since the ultimate issue is one of power, we must consider its implications in times of national emergency. Matters such as the enlistment of air raid wardens, the administration of a military draft, the mass inoculation of children to forestall an epidemic, or perhaps the threat of an international terrorist, may require a national response before federal personnel can be made available to respond. If the Constitution empowers Congress and the President to make an appropriate response, is there anything in the Tenth Amendment, "in historical understanding and practice, in the structure of the Constitution, [or] in the jurisprudence of this Court," *ante,* at 905, that forbids the enlistment of state officers to make that response effective? More narrowly, what basis is there in any of those sources for concluding that it is the Members of this Court, rather than the elected representatives of the people, who should determine whether the Constitution contains the unwritten rule that the Court announces today?

Perhaps today's majority would suggest that no such emergency is presented by the facts of these cases. But such a suggestion is itself an expression of a policy judgment. And Congress' view of the matter is quite different from that implied by the Court today.

The Brady Act was passed in response to what Congress described as an "epidemic of gun violence." H. R. Rep. No. 103–344, p. 8 (1993). The Act's legislative history notes that 15,377 Americans were murdered with firearms in 1992, and that 12,489 of these deaths were caused by handguns. *Ibid.* Congress expressed special concern that "[t]he level of firearm violence in this country is, by far, the highest among developed nations." *Ibid.* The partial solution contained in the Brady Act, a mandatory background check before a handgun may be purchased, has met with remarkable success. Between 1994 and 1996, approximately 6,600 firearm sales each month to potentially dangerous persons were prevented by Brady Act checks; over 70% of the rejected purchasers were convicted or indicted felons. See U. S. Dept. of Justice, Bureau of Justice Statistics Bulletin, A National Estimate: Presale Firearm Checks 1 (Feb. 1997). Whether or not the evaluation reflected in the enactment of the Brady Act is correct as to the extent of the danger and the efficacy of the legislation, the congressional decision surely warrants more respect than it is accorded in today's unprecedented decision.

I

The text of the Constitution provides a sufficient basis for a correct disposition of these cases.

Article I, §8, grants Congress the power to regulate commerce among the States. Putting to one side the revisionist views expressed by JUSTICE THOMAS in his concurring opinion in *United States* v. *Lopez*, 514 U. S. 549, 584 (1995), there can be no question that that provision adequately supports the regulation of commerce in handguns effected by the Brady Act. Moreover, the additional grant of authority in that section of the Constitution "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers" is surely adequate to support the temporary enlistment of local police officers in the process of identifying persons who should not be entrusted with the possession of handguns. In short, the affirmative delegation of power in Article I provides ample authority for the congressional enactment.

Unlike the First Amendment, which prohibits the enactment of a category of laws that would otherwise be authorized by Article I, the Tenth Amendment imposes no restriction on the exercise of delegated powers. Using language that plainly refers only to powers that are "*not*" delegated to Congress, it provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U. S. Const., Amdt. 10.

The Amendment confirms the principle that the powers of the Federal Government are limited to those affirmatively granted by the Constitution, but it does not purport to limit the scope or the effectiveness of the exercise of powers that are delegated to Congress.[1] See *New York* v. *United States*, 505 U. S., at 156 ("In a case . . . involving the division of authority between federal and state governments, the two inquiries are mirror images of each other"). Thus, the Amendment provides no support for a rule that immunizes local officials from obligations that might be imposed on ordinary citizens.[2] Indeed, it would be more reasonable to infer that federal law may impose greater duties on state officials than on private citizens because another provision of the Constitution requires that "all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution." Art. VI, cl. 3.

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[1] Indeed, the Framers repeatedly rejected proposed changes to the Tenth Amendment that would have altered the text to refer to "powers not *expressly* delegated to the United States." 3 W. Crosskey & W. Jeffrey, Politics and the Constitution in the History of the United States 36 (1980). This was done, as Madison explained, because "it was impossible to confine a Government to the exercise of express powers; there must necessarily be admitted powers by implication, unless the constitution descended to recount every minutia." 1 Annals of Cong. 790 (Aug. 18, 1789); see *McCulloch* v. *Maryland*, 4 Wheat. 316, 406–407 (1819).

[2] Recognizing the force of the argument, the Court suggests that this reasoning is in error because—even if it is responsive to the submission that the Tenth Amendment roots the principle set forth by the majority today—it does not answer the possibility that the Court's holding can be rooted in a "principle of state sovereignty" mentioned nowhere in the constitutional text. See *ante*, at 923–924. As a ground for invalidating important federal legislation, this argument is remarkably weak. The majority's further claim that, while the Brady Act may be legislation "necessary" to Congress' execution of its undisputed Commerce Clause authority to regulate firearms sales, it is nevertheless not "proper" because it violates state sovereignty, see *ibid.*, is wholly circular, and provides no traction for its argument. Moreover, this reading of the term

It is appropriate for state officials to make an oath or affirmation to support the Federal Constitution because, as explained in The Federalist, they "have an essential agency in giving effect to the federal Constitution." The Federalist No. 44, p. 312 (E. Bourne ed. 1947) (J. Madison).[3] There can be no conflict between their duties to the State and those owed to the Federal Government because Article VI unambiguously provides that federal law "shall be the supreme Law of the Land," binding in every State. U. S. Const., Art.

"proper" gives it a meaning directly contradicted by Chief Justice Marshall in *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819). As the Chief Justice explained, the Necessary and Proper Clause by "[i]ts terms purport[s] to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted." *Id.,* at 420; see also *id.,* at 418–419 (explaining that "the only possible effect" of the use of the term "proper" was "to present to the mind the idea of some choice of means of legislation not straitened and compressed within . . . narrow limits").

Our ruling in *New York* that the Commerce Clause does not provide Congress the authority to require States to enact legislation—a power that affects States far closer to the core of their sovereign authority—does nothing to support the majority's unwarranted extension of that reasoning today.

[3] "It has been asked why it was thought necessary, that the State magistracy should be bound to support the federal Constitution, and unnecessary that a like oath should be imposed on the officers of the united states, in favor of the State constitutions.

"Several reasons might be assigned for the distinction. I content myself with one, which is obvious and conclusive. The members of the federal government will have no agency in carrying the State constitutions into effect. The members and officers of the State governments, on the contrary, will have an essential agency in giving effect to the federal Constitution." The Federalist No. 44, at 312 (J. Madison).

VI, cl. 2. Thus, not only the Constitution, but every law enacted by Congress as well, establishes policy for the States just as firmly as do laws enacted by state legislatures.

The reasoning in our unanimous opinion explaining why state tribunals with ordinary jurisdiction over tort litigation can be required to hear cases arising under the Federal Employers' Liability Act applies equally to local law enforcement officers whose ordinary duties parallel the modest obligations imposed by the Brady Act:

> "The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State. As was said by this court in *Claflin* v. *Houseman*, 93 U. S. 130, 136, 137:
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> "'The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, paramount sovereignty.'" *Second Employers' Liability Cases*, 223 U. S. 1, 57 (1912).

See also *Testa* v. *Katt*, 330 U. S. 386, 392 (1947).

There is not a clause, sentence, or paragraph in the entire text of the Constitution of the United States that supports the proposition that a local police officer can ignore a command contained in a statute enacted by Congress pursuant to an express delegation of power enumerated in Article I.

II

Under the Articles of Confederation the National Government had the power to issue commands to the several sovereign States, but it had no authority to govern individuals directly. Thus, it raised an army and financed its operations by issuing requisitions to the constituent members of the Confederacy, rather than by creating federal agencies to draft soldiers or to impose taxes.

That method of governing proved to be unacceptable, not because it demeaned the sovereign character of the several States, but rather because it was cumbersome and inefficient. Indeed, a confederation that allows each of its members to determine the ways and means of complying with an overriding requisition is obviously more deferential to state sovereignty concerns than a national government that uses its own agents to impose its will directly on the citizenry. The basic change in the character of the government that the Framers conceived was designed to enhance the power of the National Government, not to provide some new, unmentioned immunity for state officers. Because indirect control over individual citizens ("the only proper objects of government") was ineffective under the Articles of Confederation, Alexander Hamilton explained that "we must *extend* the authority of the Union to the persons of the citizens." The Federalist No. 15, at 101 (emphasis added).

Indeed, the historical materials strongly suggest that the founders intended to enhance the capacity of the Federal Government by empowering it—as a part of the new authority to make demands directly on individual citizens—to act through local officials. Hamilton made clear that the new Constitution, "by extending the authority of the federal head to the individual citizens of the several States, will enable the government to employ the ordinary magistracy of each in the execution of its laws." The Federalist No. 27, at 180. Hamilton's meaning was unambiguous; the Federal Government was to have the power to demand that local officials implement national policy programs. As he went on to explain: "It is easy to perceive that this will tend to destroy, in the common apprehension, all distinction between the sources from which [the State and Federal Governments] might proceed; and will give the federal government the same advantage for securing a due obedience to its authority which is enjoyed by the government of each State." *Ibid.*[4]

More specifically, during the debates concerning the ratification of the Constitution, it was assumed that state agents would act as tax collectors for the Federal Government. Opponents of the Constitution had repeatedly expressed fears that the new Federal Government's ability to impose taxes directly on the citizenry would result in an overbearing presence of federal tax collectors in the States.[5] Federalists rejoined that this problem would not arise because, as Hamilton explained, "the United States . . . will make use of the State officers and State regulations for collecting" certain taxes. *Id.*, No. 36, at 235. Similarly, Madison made clear that the new central Government's power to raise taxes directly from the citizenry would "not be resorted to, except for supplemental purposes of revenue . . . and that the eventual collection, under the immediate authority of the Union, will generally be made by the officers . . . appointed by the several States." *Id.*, No. 45, at 318.[6]

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[4] The notion that central government would rule by directing the actions of local magistrates was scarcely a novel conception at the time of the founding. Indeed, as an eminent scholar recently observed: "At the time the Constitution was being framed . . . Massachusetts had virtually no administrative apparatus of its own but used the towns for such purposes as tax gathering. In the 1830s Tocqueville observed this feature of government in New England and praised it for its ideal combination of centralized legislation and decentralized administration." S. Beer, To Make a Nation: The Rediscovery of American Federalism 252 (1993). This may have provided a model for the expectation of "Madison himself . . . [that] the new federal government [would] govern through the state governments, rather in the manner of the New England states in relation to their local governments." *Ibid.*

[5] See, *e. g.*, 1 Debate on the Constitution 502 (B. Bailyn ed. 1993) (statement of "Brutus" that the new Constitution would "ope[n] a door to the appointment of a swarm of revenue and excise officers to prey upon the honest and industrious part of the community"); 2 *id.*, at 633 (statement of Patrick Henry at the Virginia Convention that "the salaries and fees of the swarm of officers and dependants on the Government will cost this Continent immense sums" and noting that "[d]ouble sets of [tax] collectors will double the expence").

The Court's response to this powerful historical evidence is weak. The majority suggests that "none of these statements necessarily implies . . . Congress could impose these responsibilities without the consent of the States." *Ante*, at 910–911 (emphasis deleted). No fair reading of these materials can justify such an interpretation. As Hamilton explained, the power of the Government to act on "individual citizens"—including "employ[ing] the ordinary magistracy" of the States—was an answer to the problems faced by a central Government that could act only directly "upon the States in their political or collective capacities." The Federalist, No. 27, at 179–180. The new Constitution would avoid this problem, resulting in "a regular and peaceable execution of the laws of the Union." *Ibid.*

This point is made especially clear in Hamilton's statement that "the legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government *as far as its just and constitutional authority extends;* and *will be rendered auxiliary to the enforcement of its laws.*" *Ibid.* (second emphasis added). It is hard to imagine a more unequivocal statement that state judicial and executive branch officials may be required to implement federal law where the National Government acts within the scope of its affirmative powers.[7]

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[6] Antifederalists acknowledged this response, and recognized the likelihood that the Federal Government would rely on state officials to collect its taxes. See, *e. g.*, 3 J. Elliot, Debates on the Federal Constitution 167–168 (2d ed. 1891) (statement of Patrick Henry). The wide acceptance of this point by all participants in the framing casts serious doubt on the majority's efforts, see *ante*, at 915–916, n. 9, to suggest that the view that state officials could be called upon to implement federal programs was somehow an unusual or peculiar position.

The Court makes two unpersuasive attempts to discount the force of this statement. First, according to the majority, because Hamilton mentioned the Supremacy Clause without specifically referring to any "congressional directive," the statement does not mean what it plainly says. *Ante,* at 912. But the mere fact that the Supremacy Clause is the source of the obligation of state officials to implement congressional directives does not remotely suggest that they might be " 'incorporat[ed] into the operations of the national government,' " The Federalist No. 27, at 177 (A. Hamilton), before their obligations have been defined by Congress. Federal law establishes policy for the States just as firmly as laws enacted by state legislatures, but that does not mean that state or federal officials must implement directives that have not been specified in any law.[8] Second, the majority suggests that interpreting this passage to mean what it says would conflict with our decision in *New York* v. *United States. Ante,* at 912. But since the *New York* opinion did not mention The Federalist No. 27, it does not affect either the relevance or the weight of the historical evidence provided by No. 27 insofar as it relates to state courts and magistrates.

Bereft of support in the history of the founding, the Court rests its conclusion on the claim that there is little evidence the National Government actually exercised such a power in the early years of the Republic. See *ante*, at 907–908. This reasoning is misguided in principle and in fact. While we have indicated that the express consideration and resolution of difficult constitutional issues by the First Congress in particular "provides 'contemporaneous and weighty evidence' of the Constitution's meaning since many of [its] Members . . . 'had taken part in framing that instrument,'" *Bowsher* v. *Synar*, 478 U. S. 714, 723–724 (1986) (quoting *Marsh* v. *Chambers*, 463 U. S. 783, 790 (1983)), we have never suggested that the failure of the early Congresses to address the scope of federal power in a particular area or to exercise a particular authority was an argument against its existence. That position, if correct, would undermine most of our post-New Deal Commerce Clause jurisprudence. As JUSTICE O'CONNOR quite properly noted in *New York*, "[t]he Federal Government undertakes activities today that would have been unimaginable to the Framers." 505 U. S., at 157.

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[7] Hamilton recognized the force of his comments, acknowledging but rejecting opponents' "sophist[ic]" arguments to the effect that this position would "tend to the destruction of the State governments." The Federalist No. 27, at 180, n.

[8] Indeed, the majority's suggestion that this consequence flows "automatically" from the officers' oath, *ante,* at 912 (emphasis deleted), is entirely without foundation in the quoted text. Although the fact that the Court has italicized the word "automatically" may give the reader the impression that it is a word Hamilton used, that is not so.

More importantly, the fact that Congress did elect to rely on state judges and the clerks of state courts to perform a variety of executive functions, see *ante*, at 905–909, is surely evidence of a contemporary understanding that their status as state officials did not immunize them from federal service. The majority's description of these early statutes is both incomplete and at times misleading.

For example, statutes of the early Congresses required in mandatory terms that state judges and their clerks perform various executive duties with respect to applications for citizenship. The First Congress enacted a statute requiring that the state courts consider such applications, specifying that the state courts "*shall* administer" an oath of loyalty to the United States, and that "the clerk of such court *shall* record such application." Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103 (emphasis added). Early legislation passed by the Fifth Congress also imposed reporting requirements relating to naturalization on court clerks, specifying that failure to perform those duties would result in a fine. Act of June 18, 1798, ch. 54, § 2, 1 Stat. 567 (specifying that these obligations "*shall* be the duty of the clerk" (emphasis added)). Not long thereafter, the Seventh Congress mandated that state courts maintain a registry of aliens seeking naturalization. Court clerks were required to receive certain information from aliens, record those data, and provide certificates to the aliens; the statute specified fees to be received by local officials in compensation. Act of Apr. 14, 1802, ch. 28, § 2, 2 Stat. 154–155 (specifying that these burdens "*shall* be the duty of such clerk" including clerks "of a . . . state" (emphasis added)).[9]

Similarly, the First Congress enacted legislation requiring state courts to serve, functionally, like contemporary regulatory agencies in certifying the seaworthiness of vessels. Act of July 20, 1790, ch. 29, § 3, 1 Stat. 132–133. The majority casts this as an adjudicative duty, *ante,* at 907, but that characterization is misleading. The law provided that upon a complaint raised by a ship's crew members, the state courts were (if no federal court was proximately located) to appoint an investigative committee of three persons "most skilful in maritime affairs" to report back. On this basis, the judge was to determine whether the ship was fit for its intended voyage. The statute sets forth, in essence, procedures for an expert inquisitorial proceeding, supervised by a judge but otherwise more characteristic of executive activity.[10]

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[9] The majority asserts that these statutes relating to the administration of the federal naturalization scheme are not proper evidence of the original understanding because over a century later, in *Holmgren* v. *United States,* 217 U. S. 509 (1910), this Court observed that that case did not present the question whether the States can be required to enforce federal laws "against their consent," *id.,* at 517. The majority points to similar comments in *United States* v. *Jones,* 109 U. S. 513, 519–520 (1883). See *ante,* at 906.

Those cases are unpersuasive authority. First, whatever their statements in dicta, the naturalization statutes at issue there, as made clear in the text, were framed in quite mandatory terms. Even the majority only goes so far as to say that "[i]t may well be" that these facially mandatory statutes in fact rested on voluntary state participation. *Ibid.* Any suggestion to the contrary is belied by the language of the statutes themselves.

Second, both of the cases relied upon by the majority rest on now-rejected doctrine. In *Jones,* the Court indicated that various duties, including the requirement that state courts of appropriate jurisdiction hear federal questions, "could not be enforced against the consent of the States." 109 U. S., at 520. That view was unanimously resolved to the contrary thereafter in the *Second Employers' Liability Cases,* 223 U. S. 1, 57 (1912), and in *Testa* v. *Katt,* 330 U. S. 386 (1947).

Finally, the Court suggests that the obligation set forth in the latter two cases that state courts hear federal claims is "voluntary" in that States need not create courts of ordinary jurisdiction. That is true, but unhelpful to the majority. If a State chooses to have no local law enforcement officials it may avoid the Brady Act's requirements, and if it chooses to have no courts it may avoid *Testa.* But neither seems likely.

The Court assumes that the imposition of such essentially executive duties on state judges and their clerks sheds no light on the question whether executive officials might have an immunity from federal obligations. *Ibid.* Even assuming that the enlistment of state judges in their judicial role for federal purposes is irrelevant to the question whether executive officials may be asked to perform the same function—a claim disputed below, see *infra,* at 968–970—the majority's analysis is badly mistaken.

We are far truer to the historical record by applying a functional approach in assessing the role played by these early state officials. The use of state judges and their clerks to perform executive functions was, in historical context, hardly unusual. As one scholar has noted, "two centuries ago, state and local judges and associated judicial personnel performed many of the functions today performed by executive officers, including such varied tasks as laying city streets and ensuring the seaworthiness of vessels." Caminker, State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?, 95 Colum. L. Rev. 1001, 1045, n. 176 (1995). And, of course, judges today continue to perform a variety of functions that may more properly be described as executive. See, *e. g.*, *Forrester* v. *White*, 484 U. S. 219, 227 (1988) (noting "intelligible distinction between judicial acts and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform"). The majority's insistence that this evidence of federal enlistment of state officials to serve executive functions is irrelevant simply because the assistance of "judges" was at issue rests on empty formalistic reasoning of the highest order.[11]

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[10] Other statutes mentioned by the majority are also wrongly miscategorized as involving essentially judicial matters. For example, the Fifth Congress enacted legislation requiring state courts to serve as repositories for reporting what amounted to administrative claims against the United States Government, under a statute providing compensation in land to Canadian refugees who had supported the United States during the Revolutionary War. Contrary to the majority's suggestion, that statute did not amount to a requirement that state courts adjudicate claims, see *ante,* at 908, n. 2; final decisions as to appropriate compensation were made by federal authorities, see Act of Apr. 7, 1798, ch. 26, § 3, 1 Stat. 548.

The Court's evaluation of the historical evidence, furthermore, fails to acknowledge the important difference between policy decisions that may have been influenced by respect for state sovereignty concerns, and decisions that are compelled by the Constitution.[12] Thus, for example, the decision by Congress to give President Wilson the authority to utilize the services of state officers in implementing the World War I draft, see Act of May 18, 1917, ch. 15, § 6, 40 Stat. 80–81, surely indicates that the National Legislature saw no constitutional impediment to the enlistment of state assistance during a federal emergency. The fact that the President was able to implement the program by respectfully "request[ing]" state action, rather than bluntly commanding it, is evidence that he was an effective statesman, but surely does not indicate that he doubted either his or Congress' power to use mandatory language if necessary.[13] If there were merit to the Court's appraisal of this incident, one would assume that there would have been some contemporary comment on the supposed constitutional concern that hypothetically might have motivated the President's choice of language.[14]

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[11] Able to muster little response other than the bald claim that this argument strikes the majority as "doubtful," *ante*, at 908, n. 2, the Court proceeds to attack the basic point that the statutes discussed above called state judges to serve what were substantially executive functions. The argument has little force. The majority's view that none of the statutes referred to in the text required judges to perform anything other than "quintessentially adjudicative tasks[s]," *ibid.*, is quite wrong. The evaluation of applications for citizenship and the acceptance of Revolutionary War claims, for example, both discussed above, are hard to characterize as the sort of adversarial proceedings to which common-law courts are accustomed. As for the majority's suggestion that the substantial administrative requirements imposed on state-court clerks under the naturalization statutes are merely "ancillary" and therefore irrelevant, this conclusion is in considerable tension with the Court's holding that the minor burden imposed by the Brady Act violates the Constitution. Finally, the majority's suggestion that the early statute requiring state courts to assess the seaworthiness of vessels is essentially adjudicative in nature is not compelling. Activities of this sort, although they may bear some resemblance to traditional common-law adjudication, are far afield from the classical model of adversarial litigation.

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[12] Indeed, an entirely appropriate concern for the prerogatives of state government readily explains Congress' sparing use of this otherwise "highly attractive," *ante*, at 905, 908, power. Congress' discretion, contrary to the majority's suggestion, indicates not that the power does not exist, but rather that the interests of the States are more than sufficiently protected by their participation in the National Government. See *infra*, at 956–957.

[13] Indeed, the very commentator upon whom the majority relies noted that the "President *might*, under the act, have issued orders directly to every state officer, and this would have been, for war purposes, a justifiable Congressional grant of all state powers into the President's hands." Note, The President, The Senate, The Constitution, and the Executive Order of May 8, 1926, 21 U. Ill. L. Rev. 142, 144 (1926).

[14] Even less probative is the Court's reliance on the decision by Congress to authorize federal marshals to rent temporary jail facilities instead of insisting that state jailkeepers house federal prisoners at federal expense. See *ante*, at 909–910. The majority finds constitutional significance in the fact that the First Congress (apparently following practice appropriate under the Articles of Confederation) had issued a request to state legisla-

The Court concludes its review of the historical materials with a reference to the fact that our decision in *INS* v. *Chadha,* 462 U. S. 919 (1983), invalidated a large number of statutes enacted in the 1970's, implying that recent enactments by Congress that are similar to the Brady Act are not entitled to any presumption of validity. But in *Chadha,* unlike these cases, our decision rested on the Constitution's express bicameralism and presentment requirements, *id.,* at 946, not on judicial inferences drawn from a silent text and a historical record that surely favors the congressional understanding. Indeed, the majority's opinion consists almost entirely of arguments *against* the substantial evidence weighing in opposition to its view; the Court's ruling is strikingly lacking in affirmative support. Absent even a modicum of textual foundation for its judicially crafted constitutional rule, there should be a presumption that if the Framers had actually intended such a rule, at least one of them would have mentioned it.[15]

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tures rather than a command to state jailkeepers, see Resolution of Sept. 29, 1789, 1 Stat. 96, and the further fact that it chose not to change that request to a command 18 months later, see Resolution of Mar. 3, 1791, 1 Stat. 225. The Court does not point us to a single comment by any Member of Congress suggesting that either decision was motivated in the slightest by constitutional doubts. If this sort of unexplained congressional action provides sufficient historical evidence to support the fashioning of judge-made rules of constitutional law, the doctrine of judicial restraint has a brief, though probably colorful, life expectancy.

[15] Indeed, despite the exhaustive character of the Court's response to this dissent, it has failed to find even an iota of evidence that any of the Framers of the Constitution or any Member of Congress who supported or opposed the statutes discussed in the text ever expressed doubt as to the power of Congress to impose federal responsibilities on local judges or police officers. Even plausible rebuttals of evidence consistently pointing in the other direction are no substitute for affirmative evidence. In short, a neutral historian would have to conclude that the Court's discussion of history does not even begin to establish a prima facie case.

III

The Court's "structural" arguments are not sufficient to rebut that presumption. The fact that the Framers intended to preserve the sovereignty of the several States simply does not speak to the question whether individual state employees may be required to perform federal obligations, such as registering young adults for the draft, 40 Stat. 80–81, creating state emergency response commissions designed to manage the release of hazardous substances, 42 U. S. C. §§11001, 11003, collecting and reporting data on underground storage tanks that may pose an environmental hazard, §6991a, and reporting traffic fatalities, 23 U. S. C. §402(a), and missing children, 42 U. S. C. §5779(a), to a federal agency.[16]

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[16] The majority's argument is particularly peculiar because these cases do not involve the enlistment of *state* officials at all, but only an effort to have federal policy implemented by officials of *local* government. Both Sheriffs Printz and Mack are county officials. Given that the Brady Act places its interim obligations on chief law enforcement officers (CLEO's), who are defined as "the chief of police, the sheriff, or an equivalent officer," 18 U. S. C. §922(s)(8), it seems likely that most cases would similarly involve local government officials.

This Court has not had cause in its recent federalism jurisprudence to address the constitutional implications of enlisting nonstate officials for federal purposes. (We did pass briefly on the issue in a footnote in *National League of Cities* v. *Usery*, 426 U. S. 833, 855, n. 20 (1976), but that case was overruled in its entirety by *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985). The question was not called to our attention in *Garcia* itself.) It is therefore worth noting that the majority's decision is in considerable tension with our Eleventh Amendment sovereign immunity cases. Those decisions were designed to "accor[d] the States the respect owed them as members of the federation." *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U. S. 139, 146 (1993). But despite the fact that "political subdivisions exist solely at the whim and behest of their State," *Port Authority Trans-Hudson Corp.* v. *Feeney*, 495 U. S. 299, 313 (1990) (Brennan, J., concurring in part and concurring in judgment), we have "consistently refused to

As we explained in *Garcia* v. *San Antonio Metropolitan Transit Authority,* 469 U. S. 528 (1985): "[T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress." *Id.,* at 550–551. Given the fact that the Members of Congress are elected by the people of the several States, with each State receiving an equivalent number of Senators in order to ensure that even the smallest States have a powerful voice in the Legislature, it is quite unrealistic to assume that they will ignore the sovereignty concerns of their constituents. It is far more reasonable to presume that their decisions to impose modest burdens on state officials from time to time reflect a considered judgment that the people in each of the States will benefit therefrom.

Indeed, the presumption of validity that supports all congressional enactments[17] has added force with respect to pol-

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construe the Amendment to afford protection to political subdivisions such as counties and municipalities." *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency,* 440 U. S. 391, 401 (1979); see also *Hess* v. *Port Authority Trans-Hudson Corporation,* 513 U. S. 30, 47 (1994). Even if the protections that the majority describes as rooted in the Tenth Amendment ought to benefit state officials, it is difficult to reconcile the decision to extend these principles to local officials with our refusal to do so in the Eleventh Amendment context. If the federal judicial power may be exercised over local government officials, it is hard to see why they are not subject to the legislative power as well.

[17] "Whenever called upon to judge the constitutionality of an Act of Congress—'the gravest and most delicate duty that this Court is called upon to perform,' *Blodgett* v. *Holden,* 275 U. S. 142, 148 (1927) (Holmes, J.)—the Court accords 'great weight to the decisions of Congress.' *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U. S. 94, 102 (1973). The Congress is a coequal branch of Government whose Members take the same oath we do to uphold the Constitution of the United States. As Justice Frankfurter noted in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 164 (1951) (concurring opinion),

icy judgments concerning the impact of a federal statute upon the respective States. The majority points to nothing suggesting that the political safeguards of federalism identified in *Garcia* need be supplemented by a rule, grounded in neither constitutional history nor text, flatly prohibiting the National Government from enlisting state and local officials in the implementation of federal law.

Recent developments demonstrate that the political safeguards protecting Our Federalism are effective. The majority expresses special concern that were its rule not adopted the Federal Government would be able to avail itself of the services of state government officials "at no cost to itself." *Ante*, at 922; see also *ante*, at 930 (arguing that "Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes"). But this specific problem of federal actions that have the effect of imposing so-called "unfunded mandates" on the States has been identified and meaningfully addressed by Congress in recent legislation.[18] See Un-

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we must have 'due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government.'" *Rostker* v. *Goldberg*, 453 U. S. 57, 64 (1981).

[18] The majority also makes the more general claim that requiring state officials to carry out federal policy causes States to "tak[e] the blame" for failed programs. *Ante*, at 930. The Court cites no empirical authority to support the proposition, relying entirely on the speculations of a law review article. This concern is vastly overstated.

Unlike state legislators, local government executive officials routinely take action in response to a variety of sources of authority: local ordinance, state law, and federal law. It doubtless may therefore require some sophistication to discern under which authority an executive official is acting, just as it may not always be immediately obvious what legal source of authority underlies a judicial decision. In both cases, affected citizens must look past the official before them to find the true cause of their grievance. See *FERC* v. *Mississippi*, 456 U. S. 742, 785 (1982) (O'CONNOR, J., concurring in part and dissenting in part) (legislators differ from judges funded Mandates Reform Act of 1995, Pub. L. 104–4, 109 Stat. 48.

The statute was designed "to end the imposition, in the absence of full consideration by Congress, of Federal mandates on State . . . governments without adequate Federal funding, in a manner that may displace other essential State . . . governmental priorities." 2 U. S. C. § 1501(2) (1994 ed., Supp. II). It functions, *inter alia*, by permitting Members of Congress to raise an objection by point of order to a pending bill that contains an "unfunded mandate," as defined by the statute, of over $50 million.[19] The mandate may not then be enacted unless the Members make an explicit decision to proceed anyway. See Recent Legislation, Unfunded Mandates Reform Act of 1995, 109 Harv. L. Rev. 1469 (1996) (describing functioning of statute). Whatever the ultimate impact of the new legislation, its passage demonstrates that

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because legislators have "the power to choose subjects for legislation"). But the majority's rule neither creates nor alters this basic truth.

The problem is of little real consequence in any event, because to the extent that a particular action proves politically unpopular, we may be confident that elected officials charged with implementing it will be quite clear to their constituents where the source of the misfortune lies. These cases demonstrate the point. Sheriffs Printz and Mack have made public statements, including their decisions to serve as plaintiffs in these actions, denouncing the Brady Act. See, *e. g.*, Shaffer, Gun Suit Shoots Sheriff into Spotlight, Arizona Republic, July 5, 1994, p. B1; Downs, Most Gun Dealers Shrug off Proposal to Raise License Fee, Missoulian, Jan. 5, 1994. Indeed, Sheriff Mack has written a book discussing his views on the issue. See R. Mack & T. Walters, From My Cold Dead Fingers: Why America Needs Guns (1994). Moreover, we can be sure that CLEO's will inform disgruntled constituents who have been denied permission to purchase a handgun about the origins of the Brady Act requirements. The Court's suggestion that voters will be confused over who is to "blame" for the statute reflects a gross lack of confidence in the electorate that is at war with the basic assumptions underlying any democratic government.

[19] Unlike the majority's judicially crafted rule, the statute excludes from its coverage bills in certain subject areas, such as emergency matters, legislation prohibiting discrimination, and national security measures. See 2 U. S. C. § 1503 (1994 ed., Supp. II).

unelected judges are better off leaving the protection of federalism to the political process in all but the most extraordinary circumstances.[20]

Perversely, the majority's rule seems more likely to damage than to preserve the safeguards against tyranny provided by the existence of vital state governments. By limiting the ability of the Federal Government to enlist state officials in the implementation of its programs, the Court creates incentives for the National Government to aggrandize itself. In the name of State's rights, the majority would have the Federal Government create vast national bureaucracies to implement its policies. This is exactly the sort of thing that the early Federalists promised would not occur, in part as a result of the National Government's ability to rely on the magistracy of the States. See, *e. g.*, The Federalist No. 36, at 234–235 (A. Hamilton); *id.*, No. 45, at 318 (J. Madison).[21]

With colorful hyperbole, the Court suggests that the unity in the Executive Branch of the Federal Government "would be shattered, and the power of the President would be subject to reduction, if Congress could . . . requir[e] state officers to execute its laws." *Ante*, at 923. Putting to one side the obvious tension between the majority's claim that impressing state police officers will unduly tip the balance of power in favor of the federal sovereign and this suggestion that it will emasculate the Presidency, the Court's reasoning contradicts *New York* v. *United States*.[22]

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[20] The initial signs are that the Act will play an important role in curbing the behavior about which the majority expresses concern. In the law's first year, the Congressional Budget Office identified only five bills containing unfunded mandates over the statutory threshold. Of these, one was not enacted into law, and three were modified to limit their effect on the States. The fifth, which was enacted, was scarcely a program of the sort described by the majority at all; it was a generally applicable increase in the minimum wage. See Congressional Budget Office, The Experience of the Congressional Budget Office During the First Year of the Unfunded Mandates Reform Act 13–15 (Jan. 1997).

[21] The Court raises the specter that the National Government seeks the authority "to impress into its service . . . the police officers of the 50 States." *Ante*, at 922. But it is difficult to see how state sovereignty and individual liberty are more seriously threatened by federal reliance on state police officers to fulfill this minimal request than by the aggrandizement of a national police force. The Court's alarmist hypothetical is no more persuasive than the likelihood that Congress would actually enact any such program.

That decision squarely approved of cooperative federalism programs, designed at the national level but implemented principally by state governments. *New York* disapproved of a particular *method* of putting such programs into place, not the *existence* of federal programs implemented locally. See 505 U. S., at 166 ("Our cases have identified a variety of methods . . . by which Congress may urge a State to adopt a legislative program consistent with federal interests"). Indeed, nothing in the majority's holding calls into question the three mechanisms for constructing such programs that *New York* expressly approved. Congress may require the States to implement its programs as a condition of federal spending,[23] in order to avoid the threat of unilateral federal action in the area,[24] or as a part of a program that affects States and private parties alike.[25] The majority's suggestion in response to this dissent that Congress' ability to create such programs is limited, *ante*, at 923, n. 12, is belied by the importance and sweep of the federal statutes that meet this description, some of which we described in *New York*. See

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[22] Moreover, with respect to programs that directly enlist the local government officials, the majority's position rests on nothing more than a fanciful hypothetical. The enactment of statutes that merely involve the gathering of information, or the use of state officials on an interim basis, do not raise even arguable separation-of-powers concerns.

[23] See *New York*, 505 U. S., at 167; see, *e. g., South Dakota* v. *Dole*, 483 U. S. 203 (1987); see also *ante*, at 936 (O'CONNOR, J., concurring).

[24] *New York*, 505 U. S., at 167; see, *e. g., Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264 (1981).

[25] *New York*, 505 U. S., at 160; see, *e. g., Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985).

505 U. S., at 167–168 (mentioning, *inter alia,* the Clean Water Act, the Occupational Safety and Health Act of 1970, and the Resource Conservation and Recovery Act of 1976).

Nor is there force to the assumption undergirding the Court's entire opinion that if this trivial burden on state sovereignty is permissible, the entire structure of federalism will soon collapse. These cases do not involve any mandate to state legislatures to enact new rules. When legislative action, or even administrative rulemaking, is at issue, it may be appropriate for Congress either to pre-empt the State's lawmaking power and fashion the federal rule itself, or to respect the State's power to fashion its own rules. But these cases, unlike any precedent in which the Court has held that Congress exceeded its powers, merely involve the imposition of modest duties on individual officers. The Court seems to accept the fact that Congress could require private persons, such as hospital executives or school administrators, to provide arms merchants with relevant information about a prospective purchaser's fitness to own a weapon; indeed, the Court does not disturb the conclusion that flows directly from our prior holdings that the burden on police officers would be permissible if a similar burden were also imposed on private parties with access to relevant data. See *New York,* 505 U. S., at 160; *Garcia* v. *San Antonio Metropolitan Transit Authority,* 469 U. S. 528 (1985). A structural problem that vanishes when the statute affects private individuals as well as public officials is not much of a structural problem.

Far more important than the concerns that the Court musters in support of its new rule is the fact that the Framers entrusted Congress with the task of creating a working structure of intergovernmental relationships around the framework that the Constitution authorized. Neither explicitly nor implicitly did the Framers issue any command that forbids Congress from imposing federal duties on private citizens or on local officials. As a general matter, Congress has followed the sound policy of authorizing federal agencies and federal agents to administer federal programs. That general practice, however, does not negate the existence of power to rely on state officials in occasional situations in which such reliance is in the national interest. Rather, the occasional exceptions confirm the wisdom of Justice Holmes' reminder that "the machinery of government would not work if it were not allowed a little play in its joints." *Bain Peanut Co. of Tex.* v. *Pinson,* 282 U. S. 499, 501 (1931).

IV

Finally, the Court advises us that the "prior jurisprudence of this Court" is the most conclusive support for its position. *Ante,* at 925. That "prior jurisprudence" is *New York* v. *United States.*[26] The case involved the validity of a federal statute that provided the States with three types of incentives to encourage them to dispose of radioactive wastes generated within their borders. The Court held that the first two sets of incentives were authorized by affirmative grants of power to Congress, and therefore "not inconsistent with the Tenth Amendment." 505 U. S., at 173, 174. That holding, of course, sheds no doubt on the validity of the Brady Act.

The third so-called "incentive" gave the States the option either of adopting regulations dictated by Congress or of taking title to and possession of the low level radioactive waste. The Court concluded that, because Congress had no power to compel the state governments to take title to the waste, the "option" really amounted to a simple command to the States to enact and enforce a federal regulatory program. *Id.*, at 176. The Court explained:

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[26] The majority also cites to *FERC* v. *Mississippi,* 456 U. S. 742 (1982), and *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U. S. 264 (1981). See *ante,* at 925–926. Neither case addressed the issue presented here. *Hodel* simply reserved the question. See 452 U. S., at 288. The Court's subsequent opinion in *FERC* did the same, see 456 U. S., at 764–765; and, both its holding and reasoning cut against the majority's view in these cases.

> "A choice between two unconstitutionally coercive regulatory techniques is no choice at all. Either way, 'the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,' *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc., supra,* at 288, an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution." *Ibid.*

After noting that the "take title provision appears to be unique" because no other federal statute had offered "a state government no option other than that of implementing legislation enacted by Congress," the Court concluded that the provision was "inconsistent with the federal structure of our Government established by the Constitution." *Id.*, at 177.

Our statements, taken in context, clearly did not decide the question presented here, whether state executive officials—as opposed to state legislators—may in appropriate circumstances be enlisted to implement federal policy. The "take title" provision at issue in *New York* was beyond Congress' authority to enact because it was "in principle . . . no different than a congressionally compelled subsidy from state governments to radioactive waste producers," *id.*, at 175, almost certainly a legislative Act.

The majority relies upon dictum in *New York* to the effect that "[t]he Federal Government may not compel the States to enact *or administer* a federal regulatory program." *Id.*, at 188 (emphasis added); see *ante*, at 933. But that language was wholly unnecessary to the decision of the case. It is, of course, beyond dispute that we are not bound by the dicta of our prior opinions. See, *e. g.*, *U. S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U. S. 18, 24 (1994) (SCALIA, J.) ("invoking our customary refusal to be bound by dicta"). To the extent that it has any substance at all, *New York*'s administration language may have referred to the possibility that the State might have been able to take title to and devise an elaborate scheme for the management of the radioactive waste through purely executive policymaking. But despite the majority's effort to suggest that similar activities are required by the Brady Act, see *ante,* at 927–928, it is hard to characterize the minimal requirement that CLEO's perform background checks as one involving the exercise of substantial policymaking discretion on that essentially legislative scale.[27]

Indeed, JUSTICE KENNEDY's recent comment about another case that was distinguishable from *New York* applies to these cases as well:

> "This is not a case where the etiquette of federalism has been violated by a formal command from the Na-

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[27] Indeed, this distinction is made in the *New York* opinion itself. In that case, the Court rejected the Government's argument that earlier decisions supported the proposition that "the Constitution does, in some circumstances, permit federal directives to state governments." *New York,* 505 U. S., at 178. But in doing so, it distinguished those cases on a ground that applies to the federal directive in the Brady Act:

> "[A]ll involve congressional regulation of individuals, not congressional requirements that States regulate. . . .
>
> . . . . .
>
> "[T]he cases relied upon by the United States hold only that federal law is enforceable in state courts and that federal courts may in proper circumstances order state officials to comply with federal law, propositions that by no means imply any authority on the part of Congress to mandate state regulation." *Id.,* at 178–179.

The Brady Act contains no command directed to a sovereign State or to a state legislature. It does not require any state entity to promulgate any federal rule. In these cases, the federal statute is not even being applied to any state official. See n. 16, *supra.* It is a "congressional regulation of individuals," *New York,* 505 U. S., at 178, including gun retailers and local police officials. Those officials, like the judges referred to in the *New York* opinion, are bound by the Supremacy Clause to comply with federal law. Thus if we accept the distinction identified in the *New York* opinion itself, that decision does not control the disposition of these cases.

> tional Government directing the State to enact a certain policy, cf. *New York* v. *United States*, 505 U. S. 144 (1992), or to organize its governmental functions in a certain way, cf. *FERC* v. *Mississippi*, 456 U. S., at 781, (O'CONNOR, J., concurring in judgment in part and dissenting in part)." *Lopez*, 514 U. S., at 583 (concurring opinion).

In response to this dissent, the majority asserts that the difference between a federal command addressed to individuals and one addressed to the State itself "cannot be a constitutionally significant one." *Ante*, at 930. But as I have already noted, n. 16, *supra*, there is abundant authority in our Eleventh Amendment jurisprudence recognizing a constitutional distinction between local government officials, such as the CLEO's who brought this action, and state entities that are entitled to sovereign immunity. To my knowledge, no one has previously thought that the distinction "disembowels," *ante*, at 931, the Eleventh Amendment.[28]

Importantly, the majority either misconstrues or ignores three cases that are more directly on point. In *FERC* v. *Mississippi*, 456 U. S. 742 (1982), we upheld a federal statute requiring state utilities commissions, *inter alia*, to take the affirmative step of considering federal energy standards in a manner complying with federally specified notice and comment procedures, and to report back to Congress periodically. The state commissions could avoid this obligation only by ceasing regulation in the field, a "choice" that we recognized was realistically foreclosed, since Congress had put forward no alternative regulatory scheme to govern this very important area. *Id.*, at 764, 766, 770. The burden on state officials that we approved in *FERC* was far more extensive than the minimal, temporary imposition posed by the Brady Act.[29]

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[28] Ironically, the distinction that the Court now finds so preposterous can be traced to the majority opinion in *National League of Cities*. See 426 U. S., at 854 ("[T]he States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce"). The fact that the distinction did not provide an adequate basis for curtailing the power of Congress to extend the coverage of the Fair Labor Standards Act to state employees does not speak to the question whether it may identify a legitimate difference between a directive to local officers to provide information or assistance to the Federal Government and a directive to a State to enact legislation.

Similarly, in *Puerto Rico* v. *Branstad*, 483 U. S. 219 (1987), we overruled our earlier decision in *Kentucky* v. *Dennison*, 24 How. 66 (1861), and held that the Extradition Act of 1793 permitted the Commonwealth of Puerto Rico to seek extradition of a fugitive from its laws without constitutional barrier. The Extradition Act, as the majority properly concedes, plainly imposes duties on state executive officers. See *ante*, at 908–909. The majority suggests that this statute is nevertheless of little importance because it simply constitutes an implementation of the authority granted the National Government by the Constitution's Extradition Clause, Art. IV, § 2. But in *Branstad* we noted ambiguity as to whether Puerto Rico benefits from that Clause, which applies on its face only to "States." Avoiding the question of the Clause's applicability, we held simply that under the Extradition Act Puerto Rico had the power to request that the State of Iowa deliver up the fugitive the Commonwealth sought. 483 U. S., at 229–230. Although *Branstad* relied on the authority of the Act alone, without the benefit of the

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[29] The majority correctly notes the opinion's statement that "this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations . . . ." *FERC*, 456 U. S., at 761–762. But the Court truncates this quotation in a grossly misleading fashion. We continued by noting *in that very sentence* that "there are instances where the Court has upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions." *Ibid.* Indeed, the Court expressly rejected as "rigid and isolated," *id.*, at 761, our suggestion long ago in *Kentucky* v. *Dennison*, 24 How. 66, 107 (1861), that Congress "has no power to impose on a State officer, as such, any duty whatever."

Extradition Clause, we noted no barrier to our decision in the principles of federalism—despite the fact that one Member of the Court brought the issue to our attention, see *id.*, at 231 (SCALIA, J., concurring in part and concurring in judgment).[30]

Finally, the majority provides an incomplete explanation of our decision in *Testa* v. *Katt*, 330 U. S. 386 (1947), and demeans its importance. In that case the Court unanimously held that state courts of appropriate jurisdiction must occupy themselves adjudicating claims brought by private litigants under the federal Emergency Price Control Act of 1942, regardless of how otherwise crowded their dockets might be with state-law matters. That is a much greater imposition on state sovereignty than the Court's characterization of the case as merely holding that "state courts cannot refuse to apply federal law," *ante*, at 928. That characterization describes only the narrower duty to apply federal law in cases that the state courts have consented to entertain.

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[30] Moreover, *Branstad* unequivocally rejected an important premise that resonates throughout the majority opinion: namely, that because the States retain their sovereignty in areas that are unregulated by federal law, notions of comity rather than constitutional power govern any direction by the National Government to state executive or judicial officers. That construct was the product of the ill-starred opinion of Chief Justice Taney in *Kentucky* v. *Dennison*, 24 How. 66 (1861), announced at a time when "the practical power of the Federal Government [was] at its lowest ebb," *Branstad*, 483 U. S., at 225. As we explained:

"If it seemed clear to the Court in 1861, facing the looming shadow of a Civil War, that 'the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it,' 24 How., at 107, basic constitutional principles now point as clearly the other way." *Id.*, at 227.

"*Kentucky* v. *Dennison* is the product of another time. The conception of the relation between the States and the Federal Government there announced is fundamentally incompatible with more than a century of constitutional development. Yet this decision has stood while the world of which it was a part has passed away. We conclude that it may stand no longer." *Id.*, at 230.

The language drawn from the Supremacy Clause upon which the majority relies ("the Judges in every State shall be bound [by federal law], any Thing in the Constitution or Laws of any state to the Contrary notwithstanding"), expressly embraces that narrower conflict of laws principle. Art. VI, cl. 2. But the Supremacy Clause means far more. As *Testa* held, because the "Laws of the United States . . . [are] the supreme Law of the Land," state courts of appropriate jurisdiction must hear federal claims whenever a federal statute, such as the Emergency Price Control Act, requires them to do so. Art. VI, cl. 2.

Hence, the Court's textual argument is quite misguided. The majority focuses on the Clause's specific attention to the point that "Judges in every State shall be bound." *Ibid.* That language commands state judges to "apply federal law" in cases that they entertain, but it is not the source of their duty to accept jurisdiction of federal claims that they would prefer to ignore. Our opinions in *Testa*, and earlier the *Second Employers' Liability Cases*, rested generally on the language of the Supremacy Clause, without any specific focus on the reference to judges.[31]

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[31] As the discussion above suggests, the Clause's mention of judges was almost certainly meant as nothing more than a choice-of-law rule, informing the state courts that they were to apply federal law in the event of a *conflict* with state authority. The majority's quotation of this language, *ante*, at 928–929, is quite misleading because it omits a crucial phrase that follows the mention of state judges. In its entirety, the Supremacy Clause reads: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, *any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.*" Art. VI, cl. 2 (emphasis added). The omitted language, in my view, makes clear that the specific reference to judges was designed to do nothing more than state a choice-of-law principle. The fact that our earliest opinions in this area, see *Testa; Second Employers' Liability Cases*, written at a time when the question was far more hotly contested

The majority's reinterpretation of *Testa* also contradicts our decision in *FERC*. In addition to the holding mentioned earlier, see *supra*, at 965–966, we also approved in that case provisions of federal law requiring a state utilities commission to "adjudicate disputes arising under [a federal] statute." *FERC*, 456 U. S., at 760. Because the state commission had "jurisdiction to entertain claims analogous to those" put before it under the federal statute, *ibid.*, we held that *Testa* required it to adjudicate the federal claims. Although the commission was serving an adjudicative function, the commissioners were unquestionably not "judges" within the meaning of Art. VI, cl. 2. It is impossible to reconcile the Court's present view that *Testa* rested entirely on the specific reference to state judges in the Supremacy Clause with our extension of that early case in *FERC*.[32]

Even if the Court were correct in its suggestion that it was the reference to judges in the Supremacy Clause, rather than the central message of the entire Clause, that dictated the result in *Testa*, the Court's implied *expressio unius* argument that the Framers therefore did *not* intend to permit the enlistment of other state officials is implausible. Throughout our history judges, state as well as federal, have merited as much respect as executive agents. The notion that the Framers would have had no reluctance to "press

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than it is today, did not rely upon that language lends considerable support to this reading.

[32] The Court's suggestion that these officials ought to be treated as "judges" for constitutional purposes because that is, functionally, what they are, is divorced from the constitutional text upon which the majority relies, which refers quite explicitly to "Judges" and not administrative officials. In addition, it directly contradicts the majority's position that early statutes requiring state courts to perform executive functions are irrelevant to our assessment of the original understanding because "Judges" were at issue. In short, the majority's adoption of a proper functional analysis gives away important ground elsewhere without shoring up its argument here.

state judges into federal service" against their will but would have regarded the imposition of a similar—indeed, far lesser— burden on town constables as an intolerable affront to principles of state sovereignty can only be considered perverse. If such a distinction had been contemplated by the learned and articulate men who fashioned the basic structure of our government, surely some of them would have said so.[33]

* * *

The provision of the Brady Act that crosses the Court's newly defined constitutional threshold is more comparable to a statute requiring local police officers to report the identity of missing children to the Crime Control Center of the Department of Justice than to an offensive federal command to a sovereign State. If Congress believes that such a statute will benefit the people of the Nation, and serve the interests of cooperative federalism better than an enlarged federal bureaucracy, we should respect both its policy judgment and its appraisal of its constitutional power.

Accordingly, I respectfully dissent.

JUSTICE SOUTER, dissenting.

I join JUSTICE STEVENS's dissenting opinion, but subject to the following qualifications. While I do not find anything dispositive in the paucity of early examples of federal employment of state officers for executive purposes, for the reason given by JUSTICE STEVENS, *ante,* at 948–949, neither would I find myself in dissent with no more to go on than those few early instances in the administration of naturalization laws, for example, or such later instances as state support for federal emergency action, see *ante*, at 949–950; *ante*, at 905–910, 916–917 (majority opinion). These illustrations of state action implementing congressional statutes are consistent with the Government's positions, but they do not speak to me with much force.

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[33] Indeed, presuming that the majority has correctly read the Supremacy Clause, it is far more likely that the founders had a special respect for the independence of judges, and so thought it particularly important to emphasize that state judges were bound to apply federal law. The Framers would hardly have felt any equivalent need to state the then well-accepted point, see *supra,* at 945–948, that the enlistment of state executive officials was entirely proper.

In deciding these cases, which I have found closer than I had anticipated, it is The Federalist that finally determines my position. I believe that the most straightforward reading of No. 27 is authority for the Government's position here, and that this reading is both supported by No. 44 and consistent with Nos. 36 and 45.

Hamilton in No. 27 first notes that because the new Constitution would authorize the National Government to bind individuals directly through national law, it could "employ the ordinary magistracy of each [State] in the execution of its laws." The Federalist No. 27, p. 174 (J. Cooke ed. 1961) (A. Hamilton). Were he to stop here, he would not necessarily be speaking of anything beyond the possibility of cooperative arrangements by agreement. But he then addresses the combined effect of the proposed Supremacy Clause, U. S. Const., Art. VI, cl. 2, and state officers' oath requirement, U. S. Const., Art. VI, cl. 3, and he states that "the Legislatures, Courts and Magistrates of the respective members will be incorporated into the operations of the national government, *as far as its just and constitutional authority extends;* and will be rendered auxiliary to the enforcement of its laws." The Federalist No. 27, at 174–175 (emphasis in original). The natural reading of this language is not merely that the officers of the various branches of state governments may be employed in the performance of national functions; Hamilton says that the state governmental machinery "will be incorporated" into the Nation's operation, and because the "auxiliary" status of the state officials will occur because they are "bound by the sanctity of an oath," *id.*, at 175, I take him to mean that their auxiliary functions will be the products of their obligations thus undertaken to support federal law, not of their own, or the States', unfettered choices.[1] Madison in No. 44 supports this reading in

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[1] The Court offers two criticisms of this analysis. First, as the Court puts it, the consequences set forth in this passage (that is, rendering state officials "auxiliary" and "incorporat[ing]" them into the operations of the Federal Government) "are said . . . to flow *automatically* from the officers' oath," *ante,* at 912; from this, the Court infers that on my reading, state officers' obligations to execute federal law must follow "without the necessity for a congressional directive that they implement it," *ibid.* But neither Hamilton nor I use the word "automatically"; consequently, there is no reason on Hamilton's view to infer a state officer's affirmative obligation without a textual indication to that effect. This is just what JUSTICE STEVENS says, *ante,* at 948, and n. 8.

Second, the Court reads The Federalist No. 27 as incompatible with our decision in *New York* v. *United States,* 505 U. S. 144 (1992), and credits me with the imagination to devise a "novel principle of political science," *ante,* at 913, n. 5, "in order to bring forth disparity of outcome from parity of language," *ibid.;* in order, that is, to salvage *New York,* by concluding that Congress can tell state executive officers what to execute without at the same time having the power to tell state legislators what to legislate. But the Court is too generous. I simply realize that "parity of language" (*i. e.,* all state officials who take the oath are "incorporated" or are "auxiliar[ies]") operates on officers of the three branches in accordance with the quite different powers of their respective branches. The core power of an executive officer is to enforce a law in accordance with its terms; that is why a state executive "auxiliary" may be told what result to bring about. The core power of a legislator acting within the legislature's subject-matter jurisdiction is to make a discretionary decision on what the law should be; that is why a legislator may not be legally ordered to exercise discretion a particular way without damaging the legislative power as such. The discretionary nature of the authorized legislative Act is probably why Madison's two examples of legislative "auxiliary" obligation address the elections of the President and Senators, see *infra,* at 973 (discussing The Federalist No. 44, p. 307 (J. Cooke ed. 1961) (J. Madison)), not the passage of legislation to please Congress.

The Court reads Hamilton's description of state officers' role in carrying out federal law as nothing more than a way of describing the duty of state officials "not to obstruct the operation of federal law," with the consequence that any obstruction is invalid. *Ante,* at 913. But I doubt that Hamilton's English was quite as bad as all that. Someone whose virtue his commentary on the oath requirement. He asks why state magistrates should have to swear to support the National Constitution, when national officials will not be required to oblige themselves to support the state counterparts. His answer is that national officials "will have no agency in carrying the State Constitutions into effect. The members and officers of the State Governments, on the contrary, will have an essential agency in giving effect to the Federal Constitution." *Id.*, No. 44, at 307 (J. Madison). He then describes the state legislative "agency" as action necessary for selecting the President, see U. S. Const., Art. II, § 1, and the choice of Senators, see U. S. Const., Art. I, § 3 (repealed by Amdt. 17). The Federalist No. 44, at 307. The Supremacy Clause itself, of course, expressly refers to the state judges' obligations under federal law, and other numbers of The Federalist give examples of state executive "agency" in the enforcement of national revenue laws.[2]

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consists of not obstructing administration of the law is not described as "incorporated into the operations" of a government or as an "auxiliary" to its law enforcement. One simply cannot escape from Hamilton by reducing his prose to inapposite figures of speech.

[2] The Court reads Madison's No. 44 as supporting its view that Hamilton meant "auxiliaries" to mean merely "nonobstructors." It defends its position in what seems like a very sensible argument, so long as one does not go beyond the terms set by the Court: if Madison really thought state executive officials could be required to enforce federal law, one would have expected him to say so, instead of giving examples of how state officials (legislative and executive, the Court points out) have roles in the election of national officials. See *ante*, at 914–915, and n. 8. One might indeed have expected that, save for one remark of Madison's, and a detail of his language, that the Court ignores. When he asked why state officers should have to take an oath to support the National Constitution, he said that "several reasons might be assigned," but that he would "content [himself] with one which is obvious & conclusive." The Federalist No. 44, at 307. The one example he gives describes how state officials will have "an essential agency in giving effect to the federal Constitution." He was not talking about executing congressional statutes; he was talking about putting the National Constitution into effect by selecting the executive and legislative members who would exercise its powers. The answer to the

Two such examples of anticipated state collection of federal revenue are instructive, each of which is put forward to counter fears of a proliferation of tax collectors. In No. 45, Hamilton says that if a State is not given (or declines to exercise) an option to supply its citizens' share of a federal tax, the "eventual collection [of the federal tax] under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several States." *Id.*, No. 45, at 313. And in No. 36, he explains that the National Government would more readily "employ the State officers as much as possible, and to attach them to

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Court's question (and objection), then, is that Madison was expressly choosing one example of state officer agency, not purporting to exhaust the examples possible.

There is, therefore, support in Madison's No. 44 for the straightforward reading of Hamilton's No. 27 and, so, no occasion to discount the authority of Hamilton's views as expressed in The Federalist as somehow reflecting the weaker side of a split constitutional personality. *Ante*, at 915–916, n. 9. This, indeed, should not surprise us, for one of the Court's own authorities rejects the "split personality" notion of Hamilton and Madison as being at odds in The Federalist, in favor of a view of all three Federalist writers as constituting a single personality notable for its integration:

"In recent years it has been popular to describe Publius [the nominal author of The Federalist] as a 'split personality' who spoke through Madison as a federalist and an exponent of limited government, [but] through Hamilton as a nationalist and an admirer of energetic government. . . . Neither the diagnosis of tension between Hamilton and Madison nor the indictment of each man for self-contradiction strikes me as a useful or perhaps even fair-minded exercise. Publius was, on any large view—the only correct view to take of an effort so sprawling in size and concentrated in time—a remarkably 'whole personality,' and I am far more impressed by the large area of agreement between Hamilton and Madison than by the differences in emphasis that have been read *into* rather than *in* their papers. . . . The intellectual tensions of *The Federalist* and its creators are in fact an honest reflection of those built into the Constitution it expounds and the polity it celebrates." C. Rossiter, Alexander Hamilton and the Constitution 58 (1964).

While Hamilton and Madison went their separate ways in later years, see *id.*, at 78, and may have had differing personal views, the passages from The Federalist discussed here show no sign of strain.

the Union by an accumulation of their emoluments," *id.*, No. 36, at 228, than by appointing separate federal revenue collectors.

In the light of all these passages, I cannot persuade myself that the statements from No. 27 speak of anything less than the authority of the National Government, when exercising an otherwise legitimate power (the commerce power, say), to require state "auxiliaries" to take appropriate action. To be sure, it does not follow that any conceivable requirement may be imposed on any state official. I continue to agree, for example, that Congress may not require a state legislature to enact a regulatory scheme and that *New York* v. *United States*, 505 U. S. 144 (1992), was rightly decided (even though I now believe its dicta went too far toward immunizing state administration as well as state enactment of such a scheme from congressional mandate); after all, the essence of legislative power, within the limits of legislative jurisdiction, is a discretion not subject to command. But insofar as national law would require nothing from a state officer inconsistent with the power proper to his branch of tripartite state government (say, by obligating a state judge to exercise law enforcement powers), I suppose that the reach of federal law as Hamilton described it would not be exceeded, cf. *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 554, 556–567 (1985) (without precisely delineating the outer limits of Congress's Commerce Clause power, finding that the statute at issue was not "destructive of state sovereignty").

I should mention two other points. First, I recognize that my reading of The Federalist runs counter to the view of Justice Field, who stated explicitly in *United States* v. *Jones*, 109 U. S. 513, 519–520 (1883), that the early examples of state execution of federal law could not have been required against a State's will. But that statement, too, was dictum, and as against dictum even from Justice Field, Madison and Hamilton prevail. Second, I do not read any of The Federalist material as requiring the conclusion that Congress could require administrative support without an obligation to pay fair value for it. The quotation from No. 36, for example, describes the United States as paying. If, therefore, my views were prevailing in these cases, I would remand for development and consideration of petitioners' points, that they have no budget provision for work required under the Act and are liable for unauthorized expenditures. Brief for Petitioner in No. 95–1478, pp. 4–5; Brief for Petitioner in No. 95–1503, pp. 6–7.

JUSTICE BREYER, with whom JUSTICE STEVENS joins, dissenting.

I would add to the reasons JUSTICE STEVENS sets forth the fact that the United States is not the only nation that seeks to reconcile the practical need for a central authority with the democratic virtues of more local control. At least some other countries, facing the same basic problem, have found that local control is better maintained through application of a principle that is the direct opposite of the principle the majority derives from the silence of our Constitution. The federal systems of Switzerland, Germany, and the European Union, for example, all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central "federal" body. Lenaerts, Constitutionalism and the Many Faces of Federalism, 38 Am. J. Comp. L. 205, 237 (1990); D. Currie, The Constitution of the Federal Republic of Germany 66, 84 (1994); Mackenzie-Stuart, Foreword, Comparative Constitutional Federalism: Europe and America ix (M. Tushnet ed. 1990); Kimber, A Comparison of Environmental Federalism in the United States and the European Union, 54 Md. L. Rev. 1658, 1675–1677 (1995). They do so in part because they believe that such a system interferes less, not more, with the independent authority of the "state," member nation, or other subsidiary government, and helps to safeguard individual liberty as well. See Council of European Communities, European Council in Edinburgh, 11–12 Dec. 1992, Conclusions of the Presidency 20–21 (1993); D. Lasok & K. Bridge, Law and Institutions of the European Union 114 (1994); Currie, *supra,* at 68, 81–84, 100–101; Frowein, Integration and the Federal Experience in Germany and Switzerland, in 1 Integration Through Law 573, 586–587 (M. Cappelletti, M. Seccombe, & J. Weiler eds. 1986); Lenaerts, *supra,* at 232, 263.

Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. Cf. The Federalist No. 20, pp. 134–138 (C. Rossiter ed. 1961) (J. Madison and A. Hamilton) (rejecting certain aspects of European federalism). But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem—in this case the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity. Cf. *id.*, No. 42, at 268 (J. Madison) (looking to experiences of European countries); *id.*, No. 43, at 275, 276 (J. Madison) (same). And that experience here offers empirical confirmation of the implied answer to a question Justice Stevens asks: Why, or how, would what the majority sees as a constitutional alternative—the creation of a new federal gun-law bureaucracy, or the expansion of an existing federal bureaucracy—better promote either state sovereignty or individual liberty? See *ante,* at 945, 959 (Stevens, J., dissenting).

As comparative experience suggests, there is no need to interpret the Constitution as containing an absolute principle—forbidding the assignment of virtually any federal duty to any state official. Nor is there a need to read the Brady Act as permitting the Federal Government to overwhelm a state civil service. The statute uses the words "reasonable effort," 18 U. S. C. § 922(s)(2)—words that easily can encompass the considerations of, say, time or cost necessary to avoid any such result.

Regardless, as JUSTICE STEVENS points out, the Constitution itself is silent on the matter. *Ante,* at 944, 954, 961 (dissenting opinion). Precedent supports the Government's position here. *Ante,* at 956, 960–961, 962–970 (STEVENS, J., dissenting). And the fact that there is not more precedent—that direct federal assignment of duties to state officers is not common—likely reflects, not a widely shared belief that any such assignment is incompatible with basic principles of federalism, but rather a widely shared practice of assigning such duties in other ways. See, *e. g., South Dakota* v. *Dole,* 483 U. S. 203 (1987) (spending power); *Garcia* v. *United States,* 469 U. S. 70 (1984); *New York* v. *United States,* 505 U. S. 144, 160 (1992) (general statutory duty); *FERC* v. *Mississippi,* 456 U. S. 742 (1982) (pre-emption). See also *ante,* at 973–974 (SOUTER, J., dissenting). Thus, there is neither need nor reason to find in the Constitution an absolute principle, the inflexibility of which poses a surprising and technical obstacle to the enactment of a law that Congress believed necessary to solve an important national problem.

For these reasons and those set forth in JUSTICE STEVENS' opinion, I join his dissent.

FOREMAN ET AL. *v.* DALLAS COUNTY, TEXAS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

No. 96–987. Decided June 27, 1997*

A Texas statute authorizes counties to appoint election judges to supervise voting on election days. Since 1983, Dallas County has changed its appointment procedures several times, always using party-affiliation formulas. Appellants sued the county and others in the Federal District Court, claiming that § 5 of the Voting Rights Act of 1965 required that the most recent change be precleared. A three-judge court held that preclearance was not required because the county was simply exercising its discretion to adjust the procedure according to party power; concluded that the Justice Department's preclearance of a 1985 submission of Texas' recodified election code operated to preclear the county's use of partisan considerations; denied injunctive relief; and later dismissed appellants' complaint.

Held: The District Court's decision is inconsistent with this Court's precedents. First, an administrative effort to comply with a precleared statute may require separate preclearance because § 5 reaches informal, as well as formal, changes. *NAACP* v. *Hampton County Election Comm'n,* 470 U. S. 166, 178. Second, the State's 1985 submission—which indicated that the only change being made to the statute was to the beginning date and duration of the election judges' appointment—was clearly insufficient to put the Justice Department on notice that the State was seeking to preclear using partisan affiliations to select election judges. See, *e. g., Young* v. *Fordice,* 520 U. S. 273, 286–287. Because the record is silent as to the county's procedure for appointing election judges on the date on which Texas became a covered jurisdiction under the Voting Rights Act, this Court cannot make a final determination whether preclearance is in fact required.

No. 96–987, dismissed and remanded; No. 96–1389, vacated and remanded.

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*Together with No. 96–1389, *Foreman et al.* v. *Dallas County, Texas, et al.,* also on appeal from the same court.

PER CURIAM.

Texas by statute authorizes counties to appoint election judges, one for each precinct, who supervise voting at the polls on election days. In 1983 and several times thereafter, Dallas County changed its procedures for selecting these officials. Each of the new methods used party-affiliation formulas of one sort or another. After the most recent change in 1996, appellants sued the county and others in the United States District Court, claiming that § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U. S. C. § 1973c, required that the changes be precleared.

A three-judge court held that preclearance was not required because the county was simply exercising, under the state statute, its "discretion to adjust [the procedure for appointing election judges] according to party power." App. to Juris. Statement 4a. The court apparently concluded that this "discretionary" use of political power meant that the various methods for selecting election judges were not covered changes under § 5. The court also concluded that the Justice Department's preclearance of a 1985 submission from the State—the recodification of its entire election code—operated to preclear the county's use of partisan considerations in selecting election judges. The court denied injunctive relief, and later dismissed appellants' complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Appellants have brought both of these rulings here.

We believe that the decision of the District Court is inconsistent with our precedents. First, in *NAACP* v. *Hampton County Election Comm'n*, 470 U. S. 166, 178 (1985), we held that even "an administrative effort to comply with a statute that had already received clearance" may require separate preclearance, because § 5 "reaches informal as well as formal changes." Thus, the fact that the county here was exercising its "discretion" pursuant to a state statute does not shield its actions from § 5. The question is simply whether the county, by its actions, whether taken pursuant to a statute or not, "enact[ed] or [sought] to administer any . . . standard, practice, or procedure with respect to voting different from" the one in place on November 1, 1972. § 5. The fact that the county's new procedures used political party affiliation as the selection criterion does not mean that the methods were exempt from preclearance.

Second, the State's 1985 submission (the recodification and a 30-page summary of changes to the old law) indicated that the only change being made to the statute concerning election judges was a change to "the beginning date and duration of [their] appointment." Thus, neither the recodified statute nor the State's explanations said anything about the use of specific, partisan-affiliation methods for selecting election judges. This submission was clearly insufficient under our precedents to put the Justice Department on notice that the State was seeking preclearance of the use of partisan affiliations in selecting election judges. See, *e. g., Young* v. *Fordice*, 520 U. S. 273, 286–287 (1997); *Lopez* v. *Monterey County*, 519 U. S. 9, 15 (1996); *Clark* v. *Roemer*, 500 U. S. 646, 658–659 (1991).

Because the parties agree that the record is silent as to the procedure used by Dallas County for appointing election judges as of November 1, 1972, the date on which Texas became a covered jurisdiction under the Voting Rights Act, we cannot make a final determination here as to whether preclearance is in fact required. We therefore vacate the judgment of the District Court in No. 96–1389, dismiss the appeal from the District Court's interlocutory judgment in No. 96–987, see *Shaffer* v. *Carter*, 252 U. S. 37, 44 (1920), and remand the cases for further proceedings.

It is so ordered.

POUNDERS, JUDGE, SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY *v.* PENELOPE WATSON

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 96–1383. Decided June 27, 1997

Respondent represented William Mora during a multidefendant murder trial in a California court. During the trial, the presiding judge, petitioner here, admonished counsel that the issue of the punishment defendants might receive if they were convicted was not open for discussion and should not be explored. When respondent brought up possible punishment while questioning Mora, the judge found her in contempt, concluding that the sole purpose of her questions was to improperly advise the jury of the potential penalty in violation of the court's order, that she was aware of the order, and that her conduct permanently prejudiced the jury. After her state habeas petitions were denied, the Federal District Court denied federal habeas relief, holding that multiple statements made in open court gave respondent adequate warning as to the prohibited conduct, thus satisfying due process notice requirements. In reversing, the Ninth Circuit did not dispute the trial court's findings, but held that respondent's conduct was not so disruptive as to justify the use of summary contempt procedures.

Held: The Ninth Circuit erred in ruling that the contempt order went beyond those necessities pertaining to the ordered administration of justice. Longstanding precedent confirms the courts' power to find summary contempt and impose punishment. See, *e. g., Ex parte Terry,* 128 U. S. 289. Since that power may be abused, summary contempt orders are confined to misconduct occurring in court, *In re Oliver,* 333 U. S. 257, 275, where the affront to the court's dignity is more widely observed, justifying summary vindication, see *In re Green,* 369 U. S. 689, 692. However, nothing in this Court's cases supports the Ninth Circuit's requirements that a contemnor engage in a pattern of repeated violations pervading the courtroom before she can be held in contempt and that a court determine that a contemnor would have repeated the misconduct but for summary punishment. To the contrary, this Court upheld summary contempt convictions after a single refusal to give immunized testimony, *United States* v. *Wilson,* 421 U. S. 309, 314, and found that the principle that the least possible power adequate to the end proposed should be used in contempt cases was satisfied because a court is justified in acting swiftly to prevent a breakdown of the proceedings during an ongoing trial, *id.*, at 319. Seriously prejudicing the jury, as the trial court found here, is comparable in terms of damage to the administration of justice to the refusals to testify in *Wilson*. There is no need to explore here what limitations and standards due process imposes on the authority to issue a summary contempt order, since respondent's conduct was well within the range of contumacious conduct disruptive of judicial proceedings and damaging to the trial court's authority.

Certiorari granted; 102 F. 3d 433, reversed.

PER CURIAM.

In this case the Court of Appeals for the Ninth Circuit granted respondent's habeas corpus petition and held invalid on due process grounds her conviction for summary contempt before a state-court judge for conduct in open court. The Court of Appeals misinterpreted the constitutional requirements for imposition of a summary contempt order. We grant the petition for a writ of certiorari and reverse.

Respondent Penelope Watson is an attorney who represented William Mora in a multidefendant murder trial in the Superior Court of the State of California in and for the County of Los Angeles. The Honorable William Pounders presided over the case, and he is the petitioner here. On April 7, 1994, counsel for one of Mora's codefendants repeatedly raised in open court the issue of the punishment defendants might receive if they were convicted. Judge Pounders stated that possible punishment " 'is not a subject that's open to discussion. It should not be explored.' " App. to Pet. for Cert. 20. Though it is not clear whether this was said at a bench conference only or reiterated in open court, it seems respondent remained at the defense table during the bench conference. Her co-counsel, Joseph Gutierrez, was at the bench on behalf of their client Mora. In later proceedings, Judge Pounders noted that "Miss Watson is no more than six feet away from us when we're at the side bar conference. She's at the end of the center table closest to the bench and only a matter of feet away." *Id.*, at 36.

On April 20, counsel for a different codefendant again raised the issue of punishment. Judge Pounders stated in open court: "'[T]he subject of sentencing of Mr. Fernandez is not part of the conversation. But more than that, it is prejudicial under [Cal. Evid. Code Ann. §]352 [(West 1966)]. It's not a subject the jury is entitled to discuss. This is not a death penalty case, so penalties are not something to discuss . . . .'" *Id.*, at 21.

The next day, respondent's co-counsel Gutierrez asked a series of questions in which he stated that defendants were "looking at life in prison." At a bench conference, while respondent remained at the defense table, Judge Pounders told Gutierrez:

> "'You had an ulterior motive in bringing out the amount of time [the witness] spent [in prison], and I think it's to show the contrast between what he got and what your clients may be facing. . . . I'm saying that's the last time I want to hear anything about a sentence. . . . You've covered it. Do not cover it again.'" *Watson* v. *Block*, 102 F. 3d 433, 435 (CA9 1996).

After the side bar, Gutierrez apologized in open court:

> "'Judge, I would just like the record to reflect that I apologize to this court for asking the question as to or informing this witness through my question that he served six months in jail and three years probation. . . . I obviously defied the Court Order, and I misunderstood the Court and I apologize.'" *Ibid.*

In response, Judge Pounders said in open court: "'It's simply that punishment is not an issue for this jury to decide, and the more that counsel want to harp on this issue of punishment, the more inappropriate it becomes.'" *Ibid.*

On June 21, while respondent was questioning Mora, the following examination and colloquy occurred:

> By Ms. Watson: "[T]hroughout this trial sometimes you've had to get up at 4:00 in the morning and not go to sleep until 10:00 at night?
>
> "Ms. Walker [for the People of California]: Objection, your honor, relevance.
>
> "The Court: Sustained.
>
> "By Ms. Watson: And during that four years [that you have been in prison], you were facing the death penalty until just the day before we started.
>
> "Ms. Walker: Your honor, People are going to object.
>
> "The Court: Sustained.
>
> "Ms. Walker: Ask Miss Watson to be admonished and the Court—
>
> "The Court: Sustained. We've already talked about this at side bar. Follow the Court's admonitions.
>
> "By Ms. Watson: You're facing life without possibility of parole?" App. to Pet. for Cert. 30–31.

At that point, Judge Pounders called counsel to the bench. The judge asked respondent why he should not hold her in contempt for discussing punishment after he had "at least twice ordered counsel not to cover" the issue. Respondent replied, "I think it goes to [Mora's] state of mind as to why he would take this risk at this point in revealing that he was the person who called 911." When the judge asked why respondent did not raise the point at sidebar, particularly when her co-counsel Gutierrez had been admonished for raising the issue, Watson responded: "I wasn't at side bar with any of that involving Mr. Gutierrez . . . ." The judge said, "You're in violation of a court order. You do not think that's relevant to anything?" Watson responded, "I didn't think it was." *Id.*, at 31, 32.

Judge Pounders then found respondent in contempt for violating Cal. Civ. Proc. Code Ann. § 1209(a)(5) (West 1997), which provides that "[d]isobedience of any lawful judgment, order, or process of the court" is grounds for contempt. The next day, on June 22, the judge issued a written order of contempt finding that "the questions asked by contemnor of Defendant Mora in the presence of the jury had as its *[sic]* sole purpose improperly advising the jury of the potential penalty for the defendants in violation of the court order." App. to Pet. for Cert. 26. He found "contemnor was aware of the Order," since she was

> "at all times . . . present (a) at or immediately adjacent to all side bar conferences and (b) present in open court on April 7, 1994, when the initial warning was given, and (c) on April 20, 1994, when the warning was repeated in open court, and (d) on April 21, 1994, when co-counsel Mr. Gutierrez apologized in open court for defying that same order." *Ibid.*

The court imposed a 2-day jail sentence to be served after trial.

On July 8, two days after the murder case was submitted to the jury, Judge Pounders gave respondent another opportunity to justify her actions. She again explained and argued through her counsel that she thought her questions were relevant and "'not covered by the court's previous rulings or admonitions.'" 102 F. 3d, at 436. Judge Pounders was not convinced. Respondent, he noted, did not ask for a side bar for clarification. He found:

> "'I think she has permanently prejudiced this jury in favor of her client. . . . They know the penalty he's facing . . . and they know that the person that was killed [a gang member] isn't worth that penalty, and so they are not going to find him guilty of the major charge.
>
> . . . . .
>
> "'And when the penalty is as extreme as this one is presented to the jury, I think that's a prejudice that cannot be overcome. . . .

. . . . .

> "'And I believe that the result is going to be that [the jury] will not find Mr. Mora guilty of the main offense, which is murder, that they may not find him guilty of much at all.'" *Ibid.*

Respondent's habeas petitions to the California Court of Appeal and the California Supreme Court were denied summarily. She filed this federal habeas corpus action in the United States District Court for the Central District of California. The District Court denied the petition on September 8, 1994, finding "[t]he record makes it quite clear that multiple statements made in open court gave Petitioner adequate warning to put a person of reasonable intelligence on notice as to what conduct Judge Pounders had prohibited, satisfying due process notice requirements." App. to Pet. for Cert. 15.

Respondent appealed to the United States Court of Appeals for the Ninth Circuit, arguing that her due process rights were violated because she did not have notice of the prohibited conduct and because the trial judge could not have known without a hearing whether her conduct was willful. The Court of Appeals did not dispute the state trial court's findings on these points. Instead, it held that "her conduct was not so disruptive as to justify use of summary contempt procedure," 102 F. 3d, at 437.

Longstanding precedent confirms the power of courts to find summary contempt and impose punishment. See, *e. g.*, *Ex parte Terry*, 128 U. S. 289 (1888). In *Cooke* v. *United States*, 267 U. S. 517 (1925), the Court said:

> "To preserve order in the court room for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the of-

> fense. Such summary vindication of the court's dignity and authority is necessary. It has always been so in the courts of the common law and the punishment imposed is due process of law." *Id.*, at 534–535.

As we have recognized, however, the contempt power may be abused. We have held the summary contempt exception to the normal due process requirements, such as a hearing, counsel, and the opportunity to call witnesses, "includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority' before the public." *In re Oliver,* 333 U. S. 257, 275 (1948) (quoting *Cooke, supra,* at 536).

We have stressed the importance of confining summary contempt orders to misconduct occurring in court. Where misconduct occurs in open court, the affront to the court's dignity is more widely observed, justifying summary vindication. See *In re Green,* 369 U. S. 689, 692 (1962) (relying on due process cases); *Harris* v. *United States,* 382 U. S. 162, 164 (1965) (defining boundary between summary and ordinary contempt under Fed. Rule Crim. Proc. 42).

United States v. *Wilson,* 421 U. S. 309 (1975), sheds light on the case before us. In *Wilson,* the prosecution called two witnesses who, in open court, refused to testify. The United States District Court granted immunity and ordered them to answer. The witnesses still refused, and the court summarily held them in contempt. We noted that although the witnesses' refusals to testify were "not delivered disrespectfully," *id.*, at 314, their conduct nevertheless justified summary contempt under Rule 42(a). It was not intimated that the contempt convictions there violated due process. "The face-to-face refusal to comply with the court's order itself constituted an affront to the court, and when that kind of refusal disrupts and frustrates an ongoing proceeding, as it did here, summary contempt must be available to vindicate the authority of the court . . . ." *Id.*, at 316. Even the dissent suggested contempt convictions would have been warranted if the witnesses had engaged in " 'insolent tactics.' " *Id.*, at 326 (Brennan, J., dissenting) (quoting *Harris, supra*, at 165).

In this case the state trial court made an express finding that respondent willfully refused to comply with the court's order. Again and again the trial court admonished counsel, both in open court and at bench conferences when respondent was sitting a few feet away, not to discuss punishment. After respondent asked her client whether he had been facing the death penalty, the court sustained an objection and said: " 'We've already talked about this at side bar. Follow the Court's admonitions.' " App. to Pet. for Cert. 24. Undaunted, respondent's next question was, " 'You're facing life without possibility of parole?' " *Id.*, at 25.

The Court of Appeals did not question the willfulness finding in its opinion. 102 F. 3d, at 438 ("[W]e do not decide the issue whether Ms. Watson willfully disobeyed a court order"). Instead, the Court of Appeals held her conduct was not sufficiently disruptive because she herself "did not engage in a pattern of repeated violations that pervaded the courtroom and threatened the dignity of the court" and because the record did not indicate she would have repeated the references to punishment unless she were held in summary contempt. *Ibid.*

All that is before us is the ruling that respondent's conduct was not disruptive enough to justify contempt, and on this issue we are in disagreement with the Court of Appeals. Nothing in our cases supports a requirement that a contemnor "engage in a pattern of repeated violations that pervaded the courtroom," *ibid.*, before she may be held in summary contempt. To the contrary, in *Wilson*, the summary contempt convictions were upheld after a single refusal to give immunized testimony, "not delivered disrespectfully." 421

U. S., at 314. We nevertheless held that the conduct there "disrupt[ed] and frustrat[ed] an ongoing proceeding." *Id.*, at 316. And we have not required that a court determine a contemnor would have repeated the misconduct but for summary punishment. While we have approved, in the context of reviewing a federal contempt order, the equitable principle that only "'the least possible power adequate to the end proposed' should be used in contempt cases," *id.*, at 319 (quoting *Anderson* v. *Dunn*, 6 Wheat. 204, 231 (1821)), we found that principle satisfied in the circumstances in *Wilson* because, during an ongoing trial, the court is justified in acting swiftly "to prevent a breakdown of the proceedings." 421 U. S., at 319. Likewise, in *Sacher* v. *United States*, 343 U. S. 1, 5 (1952), the Court upheld summary contempt convictions of counsel where the misconduct had the following characteristics: "It took place in the immediate presence of the trial judge; it consisted of breaches of decorum and disobedience in the presence of the jury of his orders and rulings upon the trial; the misconduct was professional in that it was that of lawyers" and conviction was based "upon a course of conduct long-continued in the face of warnings that it was regarded by the court as contemptuous." See also *Groppi* v. *Leslie*, 404 U. S. 496, 506 (1972). Cf. *Illinois* v. *Allen*, 397 U. S. 337, 343 (1970) ("We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case").

Here the trial court expressly found that respondent's questions had "permanently prejudiced the jury in favor of her client" and that the prejudice "cannot be overcome." The Court of Appeals glossed over the state-court finding, saying "we can understand Judge Pounders' concern that her two questions *might* prejudice jurors in favor of her client," 102 F. 3d, at 438 (emphasis added). Seriously prejudicing the jury is comparable in terms of damage to the administration of justice to the refusals to testify in *Wilson*. The trial court's finding that respondent's comments had prejudiced the jury—together with its assessment of the flagrance of respondent's defiance—support the finding of the need for summary contempt to vindicate the court's authority.

While the Due Process Clause no doubt imposes limits on the authority to issue a summary contempt order, the States must have latitude in determining what conduct so infects orderly judicial proceedings that contempt is permitted. As we have noted, we have used various phrases to describe the type of conduct required. We need not explore these limitations and standards, however, for the conduct of counsel here was well within the range of contumacious conduct disruptive of judicial proceedings and damaging to the court's authority. Advocacy that is "fearless, vigorous, and effective," *Sacher, supra,* at 13, does not extend to disruptive conduct in the course of trial and in knowing violation of a clear and specific direction from the trial judge.

On the record before us, the Court of Appeals was in error. It was error for the Court of Appeals to rule, as a matter of law, that the contempt order went beyond those necessities pertaining to the ordered administration of justice. The ruling of the Court of Appeals, not reviewed en banc, introduced uncertainty into routine proceedings of the many state courts within the Court of Appeals' large geographical jurisdiction. The judgment is reversed.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BREYER joins, dissenting.

As the Court correctly explains, the record supports the conclusion that respondent defied a court order when she asked two questions about her client's potential punishment. I assume, therefore, that she acted in contempt of court. The record also demonstrates, however, that no further misconduct or disruption of the trial occurred. The question the Court of Appeals addressed was whether these circumstances justified a summary contempt proceeding conducted by the judge before whom the contempt occurred. I do not agree with the Court that the answer to this question is so clear as to justify summary reversal.

In the majority of the cases relied on by the Court, the summary contempt power was invoked to punish conduct that threatened to disrupt the court's ongoing proceedings. See, *e. g., United States* v. *Wilson,* 421 U. S. 309 (1975). A more substantial question arises when the summary contempt proceeding is not invoked to prevent disruption of the trial, but to punish action that has already occurred. As Justice Frankfurter recognized in his dissenting opinion in *Sacher* v. *United States,* 343 U. S. 1 (1952), concerns about the adequacy of procedural safeguards are heightened in cases involving summary contempt procedures:

> "Summary punishment of contempt is concededly an exception to the requirements of Due Process. Necessity dictates the departure. Necessity must bound its limits. In this case, the course of events to the very end of the trial shows that summary measures were not necessary to enable the trial to go on. Departure from established judicial practice, which makes it unfitting for a judge who is personally involved to sit in his own case, was therefore unwarranted. . . .
>
> "This, then, was not a situation in which, even though a judge was personally involved as the target of the contemptuous conduct, peremptory action against contemnors was necessary to maintain order and to salvage the proceedings. Where such action is necessary for the decorous continuance of a pending trial, disposition by another judge of a charge of contempt is impracticable. Interruption for a hearing before a separate judge would disrupt the trial and thus achieve the illicit purpose of a contemnor." *Id.,* at 36–37, 39.

We recognized these limits to a court's summary contempt power in *In re McConnell,* 370 U. S. 230 (1962), where we granted plenary review and set aside a $100 contempt sanction for conduct that was more disruptive (although arguably more justified) than what occurred in this case.* We emphasized:

> "To preserve the kind of trials that our system envisages, Congress has limited the summary contempt power vested in courts to the least possible power adequate to prevent actual obstruction of justice, and we think that that power did not extend to this case." *Id.*, at 236.

Given that the respondent in this case asked two inappropriate questions over the course of a three and a half month long trial and that the trial continued without incident for two weeks after her contemptuous conduct, a substantial question exists as to whether fair procedure required a hearing before another judge. Neither the Court nor the petitioner contends that this summary contempt power was exercised to prevent the "actual obstruction of justice," such that a hearing before an entirely disinterested judge would have been impractical. Because I believe that these questions are important and not clearly answered by our precedents—indeed, the Court does not cite a single case that is at all comparable to this one on its facts—it is unwise to answer it without full briefing and argument.

Accordingly, I respectfully dissent.

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*In *McConnell*, the judge had erroneously ruled that plaintiff's counsel could not try a charge of conspiracy, holding that he must do so in a separate trial. To preserve his client's rights on appeal, counsel persisted in asking questions in the presence of the jury regarding the conspiracy charge. Counsel then refused to obey the judge's order to stop asking the questions, and stated that he would continue to do so unless stopped by the bailiff. After a recess, plaintiff's counsel returned to trial and asked no more forbidden questions. Following trial, and after holding a hearing, the trial judge summarily found counsel guilty of contempt and imposed a jail sentence. On appeal, the Court of Appeals sustained the convictions, but reduced the sentence to a fine of $100.

REPORTER'S NOTE

The next page is purposely numbered 1101. The numbers between 993 and 1101 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR JUNE 23 THROUGH OCTOBER 1, 1997

JUNE 23, 1997

Affirmed on Appeal

No. 96–1480. LOUISIANA ET AL. *v.* UNITED STATES. Affirmed on appeal from D. C. W. D. La. Reported below: 952 F. Supp. 1151.

Certiorari Granted—Vacated and Remanded

No. 96–17. NORTHROP GRUMMAN CORP. *v.* UNITED STATES EX REL. HYATT. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hughes Aircraft Co.* v. *United States ex rel. Schumer,* 520 U. S. 939 (1997). Reported below: 80 F. 3d 1425.

Miscellaneous Orders

No. A–855. YOUNG *v.* ILLINOIS ET AL. C. A. 7th Cir. Application for stay, addressed to JUSTICE GINSBURG and referred to the Court, denied.

No. D–1812. IN RE DISBARMENT OF KAPLAN. Robert Steven Kaplan, of Irvine, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1813. IN RE DISBARMENT OF WEISMAN. David S. Weisman, of Los Angeles, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1814. IN RE DISBARMENT OF SHIEH. Liang-Houh Shieh, of Taipei, Taiwan, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1815. In re Disbarment of Barnes. Brenda Powers Barnes, of Santa Monica, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–1816. In re Disbarment of Horne. Wayne N. Horne, of Chicago, Ill., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. M–83. Eggett *v.* Integrated Systems Solutions Corp. et al.;
No. M–84. Irby *v.* United States; and
No. M–85. Okoro *v.* United States. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 96–188. General Electric Co. et al. *v.* Joiner et ux. C. A. 11th Cir. [Certiorari granted, 520 U. S. 1114.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 96–667. United States *v.* Hyde, 520 U. S. 670. Motion of respondent to modify the opinion of this Court denied.

No. 96–1462. Lunding et ux. *v.* New York Tax Appeals Tribunal et al. Ct. App. N. Y. [Certiorari granted, 520 U. S. 1227.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 96–1482. Lexecon Inc. et al. *v.* Milberg Weiss Bershad Hynes & Lerach et al. C. A. 9th Cir. [Certiorari granted, 520 U. S. 1227.] Motion of Cotchett respondents to be dismissed as parties to this case denied.

No. 96–7151. Lewis *v.* United States. C. A. 5th Cir. [Certiorari granted, 520 U. S. 1209 and 1226.] Motion of James M. Lewis for leave to proceed further herein *in forma pauperis* granted.

No. 96–1151. In re Allen et al. Petition for writ of mandamus denied. Justice Breyer took no part in the consideration or decision of this petition.

No. 96–1683. In re Calderon, Warden. Motion of respondent for leave to proceed *in forma pauperis* denied. Petition for writ of mandamus denied.

Certiorari Granted

No. 96–1577. Alaska *v.* Native Village of Venetie Tribal Government et al. C. A. 9th Cir. Certiorari granted. Reported below: 101 F. 3d 1286.

No. 96–1469. United States *v.* Ramirez. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 91 F. 3d 1297.

Certiorari Denied

No. 96–881. Taffi et ux. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 96 F. 3d 1190.

No. 96–1102. South Carolina et al. *v.* Environmental Technology Council. C. A. 4th Cir. Certiorari denied. Reported below: 98 F. 3d 774.

No. 96–1294. RMC International, Ltd., et al. *v.* Sengoku Works, Ltd. C. A. 9th Cir. Certiorari denied. Reported below: 96 F. 3d 1217 and 97 F. 3d 1460.

No. 96–1473. Zevalkink et al. *v.* Brown, Secretary of Veterans Affairs. C. A. Fed. Cir. Certiorari denied. Reported below: 102 F. 3d 1236.

No. 96–1479. Strano et al., dba Strano Farms *v.* Department of Justice et al. C. A. 11th Cir. Certiorari denied. Reported below: 98 F. 3d 1353.

No. 96–1494. Alcan Aluminum Corp. *v.* United States et al. C. A. 3d Cir. Certiorari denied. Reported below: 96 F. 3d 1434.

No. 96–1511. O'Dell *v.* Herman, Secretary of Labor, et al. C. A. 3d Cir. Certiorari denied. Reported below: 106 F. 3d 386.

No. 96–1518. United Technologies Corp., by Its Division, Pratt & Whitney *v.* Federal Aviation Administration. C. A. 2d Cir. Certiorari denied. Reported below: 102 F. 3d 688.

No. 96–1618. Saenz, Personal Representative of the Estate of Saenz, Deceased *v.* Humana Health Plan of Texas, Inc., dba Humana Health Plan of Corpus Christi, et al. C. A. 5th Cir. Certiorari denied. Reported below: 105 F. 3d 653.

No. 96–1628. New York et al. *v.* Yonkers Board of Education et al. C. A. 2d Cir. Certiorari denied. Reported below: 96 F. 3d 600.

No. 96–1641. International Brotherhood of Electrical Workers, Local Union No. 66 *v.* Houston Lighting & Power Co. C. A. 5th Cir. Certiorari denied. Reported below: 106 F. 3d 397.

No. 96–1642. Alpex Computer Corp. *v.* Nintendo Co. Ltd. et al. C. A. Fed. Cir. Certiorari denied. Reported below: 102 F. 3d 1214.

No. 96–1668. Sheehan *v.* Daily Racing Form, Inc. C. A. 7th Cir. Certiorari denied. Reported below: 104 F. 3d 940.

No. 96–1670. Taylor et al. *v.* Rhode Island Department of Corrections et al. C. A. 1st Cir. Certiorari denied. Reported below: 101 F. 3d 780.

No. 96–1672. Phillips Co. *v.* Southern Pacific Rail Corp. et al. C. A. 10th Cir. Certiorari denied. Reported below: 97 F. 3d 1375.

No. 96–1674. Byrnes et al. *v.* LCI Communications Holdings Co. et al. Sup. Ct. Ohio. Certiorari denied. Reported below: 77 Ohio St. 3d 125, 672 N. E. 2d 145.

No. 96–1684. Mucklow *v.* Farrow Harvey et al. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 96–1685. California *v.* Broome. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 96–1688. Schlessinger *v.* Salimes et al. C. A. 7th Cir. Certiorari denied. Reported below: 100 F. 3d 519.

No. 96–1689. McCoy *v.* City and County of San Francisco et al. C. A. 9th Cir. Certiorari denied. Reported below: 106 F. 3d 408.

No. 96–1691. ORR *v.* YUHAS. C. A. 3d Cir. Certiorari denied. Reported below: 104 F. 3d 612.

No. 96–1704. SANDRA B. ET AL. *v.* O'CONNOR, DIRECTOR, MILWAUKEE COUNTY DEPARTMENT OF HUMAN SERVICES, ET AL. Ct. App. Wis. Certiorari denied.

No. 96–1713. SKEENS *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 96–1724. HOSCH *v.* GEORGIA DEPARTMENT OF HUMAN RESOURCES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 106 F. 3d 419.

No. 96–1725. SCALLET *v.* ROSENBLUM ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 106 F. 3d 391.

No. 96–1727. FETNER *v.* HAGGERTY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 99 F. 3d 1180.

No. 96–1730. BERSHATSKY *v.* LEVIN, COMMISSIONER OF JURORS, KINGS COUNTY, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 99 F. 3d 555.

No. 96–1747. LEW *v.* ROSEMOUNT, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 108 F. 3d 1391.

No. 96–1783. OFFICE OF THE PRESIDENT *v.* OFFICE OF INDEPENDENT COUNSEL ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 112 F. 3d 910.

No. 96–1784. JAISINGHANI *v.* PATCHETT. C. A. 11th Cir. Certiorari denied. Reported below: 104 F. 3d 371.

No. 96–1807. SANCHEZ *v.* ECTOR COUNTY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 108 F. 3d 332.

No. 96–1810. ROSENBAUM *v.* ROSENBAUM (two judgments). App. Ct. Ill., 1st Dist. Certiorari denied.

No. 96–1823. TUCKER ET AL. *v.* DEPARTMENT OF THE NAVY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 98 F. 3d 1335.

No. 96–1825. BODDIE *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 86 F. 3d 1178.

No. 96–1835. JACKSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 98 F. 3d 1266.

No. 96–1845. REGAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 103 F. 3d 1072.

No. 96–1869. CHRISTY *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 46 M. J. 47.

No. 96–1873. LOCKHART *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 108 F. 3d 342.

No. 96–7746. BRANNAN *v.* UNITED STUDENT AID FUNDS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 94 F. 3d 1260.

No. 96–7934. MORRIS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 546 Pa. 296, 684 A. 2d 1037.

No. 96–7983. CLARKSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 98 F. 3d 155.

No. 96–8080. ALLEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 102 F. 3d 550.

No. 96–8310. MATTHEWS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 96–8335. POLLARD *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 96–8432. MCCLAIN *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 267 Ga. 378, 477 S. E. 2d 814.

No. 96–8712. RANDALL *v.* CITY OF EDGEWATER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 106 F. 3d 416.

No. 96–8713. PRUITT *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 106 F. 3d 391.

No. 96–8722. LEWIS *v.* SUPREME COURT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 107 F. 3d 16.

No. 96–8733. ESTES *v.* BALDWIN, SUPERINTENDENT, EASTERN OREGON CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied. Reported below: 106 F. 3d 407.

No. 96–8739. TORRES *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 96–8742. TAYLOR *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 96–8748. LUCIEN *v.* PETERS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 107 F. 3d 873.

No. 96–8757. SMITH *v.* IEYOUB, ATTORNEY GENERAL OF LOUISIANA, ET AL. C. A. 5th Cir. Certiorari denied.

No. 96–8760. WHITE *v.* ANDERSON, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied.

No. 96–8761. MCBROOM *v.* FRANKLIN COUNTY BOARD OF ELECTIONS. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 96–8762. MILLER *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 284 Ill. App. 3d 16, 671 N. E. 2d 376.

No. 96–8764. MATCHETT *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 941 S. W. 2d 922.

No. 96–8772. WOLFGRAM *v.* MILLER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 100 F. 3d 966.

No. 96–8782. BROWN *v.* AMERICAN EXPRESS TRAVEL RELATED SERVICES CO., INC., ET AL. C. A. D. C. Cir. Certiorari denied.

No. 96–8783. JARRETT *v.* W–F DEVELOPMENT CO., INC., ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 96–8788. LOWE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 96–8790. CUMBEE *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 96–8791. MCKAY *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 96–8800. HUGHEY *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 96–8818. MOORE *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 106 F. 3d 405.

No. 96–8822. MANWANI *v.* BRUNELLE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 99 F. 3d 400.

No. 96–8846. FOSTER *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 687 So. 2d 1124.

No. 96–8869. ANDERSON *v.* GROOSE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 106 F. 3d 242.

No. 96–8893. PENROD *v.* NORTON ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 87 F. 3d 1327.

No. 96–8899. BARTLEY *v.* SULLIVAN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 106 F. 3d 396.

No. 96–8911. MITCHELL *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 934 P. 2d 346.

No. 96–8912. MCGREGOR *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 935 P. 2d 332.

No. 96–8915. WALLACE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 935 P. 2d 366.

No. 96–8928. EVANS *v.* DEMOSTHENES, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 98 F. 3d 1174.

No. 96–8931. EWING *v.* MCDANIEL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 96–8942. MUNDY *v.* HATCHER, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 96–8944. JONES *v.* TOOMBS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 107 F. 3d 870.

No. 96–8968. ALLEN *v.* DUNCAN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 108 F. 3d 336.

No. 96–8977. EDWARDS *v.* THOMAS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 107 F. 3d 20.

No. 96–8979. SATTERWHITE *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 103 F. 3d 125.

No. 96–8995. MASTERS *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 96–9008. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 108 F. 3d 332.

No. 96–9013. ONYEAGORO *v.* R. P. HOLMES, INC. C. A. 1st Cir. Certiorari denied.

No. 96–9014. SMITH *v.* BILLER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 89 F. 3d 839.

No. 96–9038. ELDER *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 111 F. 3d 144.

No. 96–9042. ROUTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 104 F. 3d 59.

No. 96–9043. HARMON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 103 F. 3d 149.

No. 96–9044. MITCHELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 104 F. 3d 361.

No. 96–9045. WARREN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 106 F. 3d 1354.

No. 96–9046. TONEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 97 F. 3d 1469.

No. 96–9048. THOMPSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 107 F. 3d 864.

No. 96–9051. SPENCER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 106 F. 3d 394.

No. 96–9055. MATLOCK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 103 F. 3d 142.

No. 96–9060. NG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 112 F. 3d 504.

No. 96–9061. Rogers *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 111 F. 3d 128.

No. 96–9066. Codrington *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 96–9070. Smith *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 52 F. 3d 1070.

No. 96–9071. Short *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 96 F. 3d 1449.

No. 96–9073. Bundy *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 96–9077. Williams *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 109 F. 3d 771.

No. 96–9079. Burns *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 96–9096. Elias *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 111 F. 3d 896.

No. 96–9098. De la Mora *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 107 F. 3d 863.

No. 96–9100. Davis *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 105 F. 3d 660.

No. 96–9101. Hill *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 107 F. 3d 25.

No. 96–9102. Hibbley *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 109 F. 3d 770.

No. 96–9104. Gnirke *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 108 F. 3d 339.

No. 96–9110. Lowe *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 106 F. 3d 1498.

No. 96–9112. Estrella *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 104 F. 3d 3.

No. 96–9115. Banks *v.* United States et al. C. A. 11th Cir. Certiorari denied. Reported below: 106 F. 3d 417.

No. 96–9116. MALPIEDI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 107 F. 3d 5.

No. 96–9117. HERNANDEZ SALGADO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 107 F. 3d 22.

No. 96–9120. WHITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 109 F. 3d 766.

No. 96–9123. BURTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 104 F. 3d 359.

No. 96–9129. NESBITT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 106 F. 3d 393.

No. 96–9135. RUA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 109 F. 3d 771.

No. 96–9136. SIMPSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 107 F. 3d 18.

No. 96–9139. BOZZA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 109 F. 3d 772.

No. 96–9147. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 109 F. 3d 767.

No. 96–9152. UPSHAW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 108 F. 3d 340.

No. 96–9153. TURNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 107 F. 3d 869.

No. 96–9157. ARTOLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 107 F. 3d 878.

No. 96–1210. UNITED STUDENT AID FUNDS, INC. *v.* BRANNAN. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 94 F. 3d 1260.

No. 96–1678. CALDERON, WARDEN *v.* MOORE. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 108 F. 3d 261.

No. 96–1498. SCIOTO COUNTY REGIONAL WATER DISTRICT NO. 1, AUTHORITY *v.* SCIOTO WATER, INC., ET AL. C. A. 6th

Cir. Motions of Bell Arthur Water Corp. et al. and Cass Rural Water Users Inc. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 103 F. 3d 38.

No. 96–1694. NEW MEXICO TAXATION AND REVENUE DEPARTMENT *v.* CONOCO, INC., ET AL. Sup. Ct. N. M. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 122 N. M. 736, 931 P. 2d 730.

No. 96–8743. BENNEY *v.* SHAW INDUSTRIES, INC., ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 96–1707. TEXAS MANUFACTURED HOUSING ASSN., INC., ET AL. *v.* CITY OF NEDERLAND ET AL. C. A. 5th Cir. Motion of Manufactured Housing Institute for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 101 F. 3d 1095.

Rehearing Denied

No. 96–879. SOFFER *v.* BOARD OF TRUSTEES OF THE CITY UNIVERSITY OF NEW YORK ET AL., 519 U. S. 1112;

No. 96–7411. SMITH *v.* CHATER, COMMISSIONER OF SOCIAL SECURITY (two judgments), 520 U. S. 1171;

No. 96–7729. PARKER *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, ET AL., 520 U. S. 1171;

No. 96–7783. EDDMONDS *v.* WASHINGTON, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, 520 U. S. 1172;

No. 96–8047. JENKINS *v.* OAKLEY ET AL., 520 U. S. 1200;

No. 96–8096. MULTANI *v.* UNITED STATES ET AL., 520 U. S. 1214;

No. 96–8126. KENT *v.* HARVARD ET AL., 520 U. S. 1215;

No. 96–8152. PORTER *v.* UNITED STATES, 520 U. S. 1177;

No. 96–8153. SPEARS *v.* UNITED STATES, 520 U. S. 1178; and

No. 96–8438. PIZZO *v.* LOUISIANA, 520 U. S. 1218. Petitions for rehearing denied.

JUNE 24, 1997

Dismissal Under Rule 46

No. 96–1652. ZOLLER *v.* NEW YORK LIFE INSURANCE CO. ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari dismissed under this Court's Rule 46.2. Reported below: 228 App. Div. 2d 368, 644 N. Y. S. 2d 617.

JUNE 25, 1997

Miscellaneous Order

No. 96–9506 (A–931). IN RE WORATZECK. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 96–9505 (A–929). WORATZECK *v.* ARIZONA BOARD OF EXECUTIVE CLEMENCY ET AL. C. A. 9th Cir. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Certiorari denied. Reported below: 117 F. 3d 400.

JUNE 26, 1997

Dismissal Under Rule 46

No. 96–1706. TEXAS LIFE, ACCIDENT, HEALTH & HOSPITAL SERVICE INSURANCE GUARANTY ASSN. *v.* GAYLORD ENTERTAINMENT CO. ET AL. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46.2. Reported below: 105 F. 3d 210.

JUNE 27, 1997

Affirmed on Appeal

No. 96–595. RENO, ATTORNEY GENERAL *v.* SHEA. Affirmed on appeal from D. C. S. D. N. Y. Reported below: 930 F. Supp. 916.

No. 96–1779. MEADOWS, SECRETARY, STATE BOARD OF ELECTIONS OF VIRGINIA, ET AL. *v.* MOON ET AL.; and

No. 96–1918. HARRIS ET AL. *v.* MOON ET AL. Affirmed on appeals from D. C. E. D. Va. Reported below: 952 F. Supp. 1141.

Appeal Dismissed. (See No. 96–987, *ante,* p. 979.)

Vacated and Remanded on Appeal. (See No. 96–1389, *ante,* p. 979.)

Certiorari Granted—Vacated and Remanded

No. 95–1879. DEPARTMENT OF AGRICULTURE *v.* CAL-ALMOND, INC., ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Glickman* v. *Wileman Brothers & Elliott, Inc., ante,* p. 457. Reported below: 67 F. 3d 874.

No. 95–2006. FRANK, SHERIFF, ORANGE COUNTY, VERMONT *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Printz* v. *United States, ante,* p. 898. Reported below: 78 F. 3d 815.

No. 96–323. K. R., AN INFANT, BY HER PARENTS AND NEXT FRIENDS, ET AL. *v.* ANDERSON COMMUNITY SCHOOL CORP. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the Individuals With Disabilities Education Act Amendments of 1997. Reported below: 81 F. 3d 673.

No. 96–437. CHRISTIANS, TRUSTEE *v.* CRYSTAL EVANGELICAL FREE CHURCH. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *City of Boerne* v. *Flores, ante,* p. 507. Reported below: 82 F. 3d 1407.

No. 96–710. SULLIVAN ET AL. *v.* SASNETT ET AL. C. A. 7th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *City of Boerne* v. *Flores, ante,* p. 507. Reported below: 91 F. 3d 1018.

No. 96–776. BOARD OF EDUCATION OF THE ENLARGED CITY SCHOOL DISTRICT OF THE CITY OF WATERVLIET, NEW YORK *v.* RUSSMAN, CHILD WITH DISABILITIES, BY HER PARENTS, RUSSMAN ET VIR. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the Individuals With Disabilities Education Act Amendments of 1997. Reported below: 85 F. 3d 1050.

No. 96–1267. ABRAMS *v.* BARNETT, WARDEN. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lindh* v. *Murphy, ante,* p. 320. Reported below: 100 F. 3d 485.

No. 96–1379. FLANAGAN ET AL. *v.* AHEARN ET AL.; and

No. 96–1394. ORTIZ ET AL. *v.* FIBREBOARD CORP. ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Amchem Products, Inc.* v. *Windsor, ante,* p. 591. Reported below: 90 F. 3d 963.

No. 96–1633. UNIFIED SCHOOL DISTRICT NO. 259, SEDGWICK COUNTY, KANSAS *v.* FOWLER ET UX., PARENTS AND NEXT FRIENDS OF FOWLER; and

No. 96–1865. FOWLER ET UX., PARENTS AND NEXT FRIENDS OF FOWLER *v.* UNIFIED SCHOOL DISTRICT NO. 259, SEDGWICK COUNTY, KANSAS. C. A. 10th Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of Individuals With Disabilities Education Act Amendments of 1997. Reported below: 107 F. 3d 797.

No. 96–8014. FRETWELL *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lindh* v. *Murphy, ante,* p. 320.

No. 96–8170. MOORE *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lindh* v. *Murphy, ante,* p. 320. Reported below: 101 F. 3d 1069.

Certiorari Granted—Reversed. (See No. 96–1383, *ante,* p. 982.)

Miscellaneous Orders

No. D–1798. IN RE DISBARMENT OF SLOBODA. Disbarment entered. [For earlier order herein, see 520 U. S. 1184.]

No. D–1817. IN RE DISBARMENT OF WILLIAMS. Kenneth Mack Williams, of Glen Burnie, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1818. IN RE DISBARMENT OF SOSNAY. Robert S. Sosnay, of Wauwatosa, Wis., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. M–87. RIVERA-ROBLES *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. M–89. LYLE *v.* JARRELL ET AL.;
No. M–90. COLEMAN *v.* TAYLOR; and
No. M–91. NORTH AMERICAN MARINE, INC., ET AL. *v.* PONTOON SHIPPING CO., LTD. (CYPRUS). Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 108, Orig. NEBRASKA *v.* WYOMING ET AL. Motion of the Special Master for compensation and reimbursement of expenses granted, and the Special Master is awarded a total of $42,577.26 for the period of November 16, 1996, through June 15, 1997, to be paid as follows: 30% by Nebraska, 30% by Wyoming, 15% by Colorado, and 25% by the United States. [For earlier order herein, see, *e. g.*, 519 U. S. 1038.]

No. 120, Orig. NEW JERSEY *v.* NEW YORK. Motion of the Special Master for compensation and reimbursement of expenses granted, and the Special Master is awarded a total of $263,488.89 to be paid equally by the parties. Motion of New York for leave to file Exceptions in excess of the page limitations denied. Motion of the City of New York for leave to file a brief as *amicus curiae* in excess of the page limitations denied. [For earlier order herein, see, *e. g.*, 520 U. S. 1273.]

No. 95–1726. UNITED STATES *v.* LABONTE ET AL., 520 U. S. 751. Motion of respondent Stephen Dyer to modify the opinion denied.

No. 96–779. ARKANSAS EDUCATIONAL TELEVISION COMMISSION *v.* FORBES. C. A. 8th Cir. [Certiorari granted, 520 U. S. 1114.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted to be divided as follows: petitioner, 25 minutes; respondent, 25 minutes; and the Acting Solicitor General, 10 minutes.

No. 96–871. STATE OIL CO. *v.* KHAN ET AL. C. A. 7th Cir. [Certiorari granted, 519 U. S. 1107.] Motion of New York et al. for leave to participate in oral argument as *amici curiae* and for divided argument granted.

No. 96–1742. BELSHE, DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH SERVICES *v.* ORTHOPAEDIC HOSPITAL ET AL. C. A.

9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 96–9220. In re Hughey;
No. 96–9235. In re Stone; and
No. 96–9255. In re Blumeyer. Petitions for writs of habeas corpus denied.

No. 96–8947. In re Carney et al. Petition for writ of mandamus denied.

Certiorari Granted

No. 96–1037. Kiowa Tribe of Oklahoma *v.* Manufacturing Technologies, Inc. Ct. Civ. App. Okla. Certiorari granted.

No. 96–1613. United States *v.* Estate of Romani. Sup. Ct. Pa. Certiorari granted. Reported below: 547 Pa. 41, 688 A. 2d 703.

No. 96–679. Piscataway Township Board of Education *v.* Taxman. C. A. 3d Cir. Motions of National School Boards Association and New Jersey School Boards Association for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 91 F. 3d 1547.

No. 96–1395. King, Director, Office of Personnel Management *v.* Erickson et al.; and King, Director, Office of Personnel Management *v.* McManus et al. C. A. Fed. Cir. Motion of respondent Jeanette Walsh for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 89 F. 3d 1575 (first judgment); 92 F. 3d 1208 (second judgment).

No. 96–1578. Phillips et al. *v.* Washington Legal Foundation et al. C. A. 5th Cir. Certiorari granted limited to the following question: "Is interest earned on client trust funds held by lawyers in IOLTA accounts a property interest of the client or lawyer, cognizable under the Fifth Amendment of the United States Constitution, despite the fundamental precept of IOLTA that such funds, absent the IOLTA program, could not earn interest for the client or lawyer?" Reported below: 94 F. 3d 996.

No. 96–1769. Ohio Adult Parole Authority et al. *v.* Woodard. C. A. 6th Cir. Motion of respondent for leave to proceed *in* *forma pauperis* granted. Certiorari granted. Reported below: 107 F. 3d 1178.

Certiorari Denied

No. 95–2052. United States *v.* Gonzalez, Sheriff, Val Verde County, Texas, et al.; and

No. 95–2077. Gonzalez, Sheriff, Val Verde County, Texas, et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 79 F. 3d 452.

No. 95–8131. Schmidt *v.* Wisconsin. Sup. Ct. Wis. Certiorari denied. Reported below: 197 Wis. 2d 252, 541 N. W. 2d 105.

No. 95–8204. Post et al. *v.* Wisconsin. Sup. Ct. Wis. Certiorari denied. Reported below: 197 Wis. 2d 279, 541 N. W. 2d 115.

No. 95–9308. Marberry *v.* Wisconsin. Ct. App. Wis. Certiorari denied.

No. 96–577. Tristar Corp. *v.* Freitas et al. C. A. 2d Cir. Certiorari denied. Reported below: 84 F. 3d 550.

No. 96–628. Keane, Superintendent, Sing Sing Correctional Facility *v.* Boria. C. A. 2d Cir. Certiorari denied. Reported below: 99 F. 3d 492.

No. 96–823. Kansas *v.* Myers. Sup. Ct. Kan. Certiorari denied. Reported below: 260 Kan. 669, 923 P. 2d 1024.

No. 96–1059. Sycuan Band of Mission Indians et al. *v.* Wilson, Governor of California, et al. C. A. 9th Cir. Certiorari denied. Reported below: 64 F. 3d 1250 and 99 F. 3d 321.

No. 96–1326. Handicabs, Inc. *v.* National Labor Relations Board. C. A. 8th Cir. Certiorari denied. Reported below: 95 F. 3d 681.

No. 96–1392. Fink *v.* Ryan, Secretary of State of Illinois. Sup. Ct. Ill. Certiorari denied. Reported below: 174 Ill. 2d 302, 673 N. E. 2d 281.

No. 96–1447. United Brotherhood of Carpenters and Joiners of America, AFL–CIO *v.* BE&K Construction Co.

et al. Sup. Ct. Ala. Certiorari denied. Reported below: 688 So. 2d 246.

No. 96–1491. Cusimano *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 97 F. 3d 663.

No. 96–1538. Toland et ux., dba John Toland Co. *v.* Prudential Securities Inc. et al.;
No. 96–1731. Bishofberger et ux. *v.* Prudential Securities Inc. et al.; and
No. 96–1732. Jackson et ux. *v.* Prudential Securities Inc. et al. C. A. 2d Cir. Certiorari denied. Reported below: 107 F. 3d 4.

No. 96–1539. Loon Mountain Recreation Corp. *v.* Dubois et al. C. A. 1st Cir. Certiorari denied. Reported below: 102 F. 3d 1273.

No. 96–1542. Federation for American Immigration Reform, Inc. *v.* Reno, Attorney General, et al. C. A. D. C. Cir. Certiorari denied. Reported below: 93 F. 3d 897.

No. 96–1571. KARE 11, an NBC Affiliate and a Division of Combined Communications Corp., et al. *v.* Ryther. C. A. 8th Cir. Certiorari denied. Reported below: 108 F. 3d 832.

No. 96–1574. Pantani et vir *v.* Richardson, Commissioner of Internal Revenue, et al. C. A. 2d Cir. Certiorari denied. Reported below: 104 F. 3d 352.

No. 96–1639. Dempster *v.* Municipality of Anchorage et al. C. A. 9th Cir. Certiorari denied.

No. 96–1651. WCC Associates et al. *v.* Hawaii Carpenters Trust Funds. Sup. Ct. Haw. Certiorari denied. Reported below: 83 Haw. 205, 925 P. 2d 375.

No. 96–1657. Mullins *v.* Manning Coal Corp. et al. Sup. Ct. Ky. Certiorari denied. Reported below: 938 S. W. 2d 260.

No. 96–1687. Isenbergh et al., Co-Personal Representatives of the Estate of Isenbergh, Deceased *v.* Knight-Ridder Newspaper Sales, Inc., nka Newspapers First, Inc., et al. C. A. 11th Cir. Certiorari denied. Reported below: 97 F. 3d 436.

No. 96–1696. Dagi *v.* Chris Motors Corp. et al. C. A. 11th Cir. Certiorari denied. Reported below: 102 F. 3d 555.

No. 96–1698. Institut Pasteur et al. *v.* Cambridge Biotech Corp. C. A. 1st Cir. Certiorari denied. Reported below: 104 F. 3d 489.

No. 96–1701. Vernon, Sheriff, Rockingham County *v.* Harter et al. C. A. 4th Cir. Certiorari denied. Reported below: 101 F. 3d 334.

No. 96–1708. Holt *v.* Mitchell, Judge, Circuit Court of Duval County, Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 689 So. 2d 1069.

No. 96–1709. Holt *v.* Lee. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 681 So. 2d 282.

No. 96–1710. United States Fire Insurance Co. et al. *v.* Asbestos Claims Management Corp. et al. C. A. 2d Cir. Certiorari denied. Reported below: 101 F. 3d 813.

No. 96–1714. Elliott et vir, Representatives of the Estate of Elliott, Deceased *v.* Leavitt et al. C. A. 4th Cir. Certiorari denied. Reported below: 99 F. 3d 640.

No. 96–1718. Homebuilders Association of Central Arizona et al. *v.* City of Scottsdale et al. Sup. Ct. Ariz. Certiorari denied. Reported below: 187 Ariz. 479, 930 P. 2d 993.

No. 96–1722. RFE Industries, Inc. *v.* SPM Corp. C. A. 4th Cir. Certiorari denied. Reported below: 105 F. 3d 923.

No. 96–1726. American Investors Life Insurance Co. *v.* Hudson. Ct. App. Ark. Certiorari denied. Reported below: 55 Ark. App. 360, 935 S. W. 2d 594.

No. 96–1729. Kniskern, Administrator of the Estate of Cavaliere, Deceased, et al. *v.* Township of Somerford et al. Ct. App. Ohio, Franklin County. Certiorari denied. Reported below: 112 Ohio App. 3d 189, 678 N. E. 2d 273.

No. 96–1734. Arizona *v.* Palenkas. Ct. App. Ariz. Certiorari denied. Reported below: 188 Ariz. 201, 933 P. 2d 1269.

No. 96–1735. Texas *v.* Mowbray. Ct. Crim. App. Tex. Certiorari denied. Reported below: 943 S. W. 2d 461.

No. 96–1737. Swanson *v.* Knabe. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 96–1744. Gonzalez et al. *v.* Gallo. Sup. Ct. Cal. Certiorari denied. Reported below: 14 Cal. 4th 1090, 929 P. 2d 596.

No. 96–1745. Enercon Industries Corp. et al. *v.* Pillar Corp. et al. C. A. Fed. Cir. Certiorari denied. Reported below: 105 F. 3d 1437.

No. 96–1748. Johnson *v.* Greater Southeast Community Hospital Corp. et al. C. A. D. C. Cir. Certiorari denied.

No. 96–1750. Medico *v.* Medico et al. C. A. 3d Cir. Certiorari denied. Reported below: 107 F. 3d 862.

No. 96–1752. New Port Largo, Inc. *v.* Monroe County. C. A. 11th Cir. Certiorari denied. Reported below: 95 F. 3d 1084.

No. 96–1756. McMillian *v.* Tate et al.; and
No. 96–1765. Tate *v.* McMillian. C. A. 11th Cir. Certiorari denied. Reported below: 88 F. 3d 1554 and 101 F. 3d 1363.

No. 96–1766. Washington Legal Foundation et al. *v.* Texas Equal Access to Justice Foundation et al. C. A. 5th Cir. Certiorari denied. Reported below: 94 F. 3d 996.

No. 96–1778. Abrams *v.* Office of Bar Counsel for the District of Columbia. Ct. App. D. C. Certiorari denied. Reported below: 689 A. 2d 6.

No. 96–1780. Members of the Disciplinary Board of the Supreme Court of New Mexico et al. *v.* Revo. C. A. 10th Cir. Certiorari denied. Reported below: 106 F. 3d 929.

No. 96–1781. Stevens et ux. *v.* City of Cannon Beach et al. C. A. 9th Cir. Certiorari denied. Reported below: 106 F. 3d 409.

No. 96–1817. Taylor *v.* Connecticut. Sup. Ct. Conn. Certiorari denied. Reported below: 239 Conn. 481, 687 A. 2d 489.

No. 96–1834. Agency Rent-A-Car, Inc., et al. *v.* Hall. Ct. App. D. C. Certiorari denied.

No. 96–1842. Rush *v.* Texas. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 96–1846. Newman et ux. *v.* Worcester County Department of Social Services. Ct. App. Ind. Certiorari denied. Reported below: 659 N. E. 2d 593.

No. 96–1850. Reynolds, Warden, et al. *v.* Brown. C. A. 10th Cir. Certiorari denied.

No. 96–1859. Diana *v.* Florida. Cir. Ct. Pinellas County, Fla. Certiorari denied.

No. 96–1868. Goldtooth *v.* Merit Systems Protection Board. C. A. Fed. Cir. Certiorari denied. Reported below: 106 F. 3d 427.

No. 96–1876. Ehrlander *v.* Department of Transportation of Alaska et al. Sup. Ct. Alaska. Certiorari denied.

No. 96–1903. Abbey *v.* Sverdrup Corp. et al. Sup. Ct. Ala. Certiorari denied. Reported below: 692 So. 2d 833.

No. 96–1922. Great Plains Chemical Co., Inc., et al. *v.* Micro Chemical, Inc. C. A. Fed. Cir. Certiorari denied. Reported below: 103 F. 3d 1538.

No. 96–1931. Salerno *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 108 F. 3d 730.

No. 96–5609. Christy *v.* Magnuson et al. C. A. 6th Cir. Certiorari denied. Reported below: 85 F. 3d 628.

No. 96–7662. Anderson *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 932 S. W. 2d 502.

No. 96–7758. Fierro *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 934 S. W. 2d 370.

No. 96–8280. Willis *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 102 F. 3d 1078.

No. 96–8380. Unterburger et al. *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 97 F. 3d 1413.

No. 96–8405. Vasquez *v.* Office of Personnel Management et al. C. A. 10th Cir. Certiorari denied. Reported below: 105 F. 3d 670.

No. 96–8413. Murdoch *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 98 F. 3d 472.

No. 96–8499. CARDAN *v.* NYX ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 96–8577. LOCKHART *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 104 F. 3d 54.

No. 96–8672. MATHENIA *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 99 F. 3d 1476.

No. 96–8755. GIBSON *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 424 Mass. 242, 675 N. E. 2d 776.

No. 96–8767. BARQUERO *v.* MEDRANO. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 96–8773. AMERSON *v.* IDAHO. Ct. App. Idaho. Certiorari denied. Reported below: 129 Idaho 395, 925 P. 2d 399.

No. 96–8774. BOWLES *v.* WALDEN ET AL. C. A. 11th Cir. Certiorari denied.

No. 96–8797. STOBAUGH *v.* WOOD, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 107 F. 3d 17.

No. 96–8803. GRANT *v.* IN REM RELEASE BOARD ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 226 App. Div. 2d 375, 640 N. Y. S. 2d 227.

No. 96–8804. GODETT *v.* GAITHER, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 96–8805. THOMAS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 96–8811. MCGEE *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 104 F. 3d 370.

No. 96–8814. MOYA *v.* EYHERBIDE ET AL. C. A. 9th Cir. Certiorari denied.

No. 96–8817. LOYER *v.* LOYER ET AL. (two judgments). Ct. App. Ohio, Huron County. Certiorari denied.

No. 96–8819. JOHNSON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 96–8832. ASSA'AD-FALTAS *v.* ROGERS. C. A. 4th Cir. Certiorari denied. Reported below: 106 F. 3d 389.

No. 96–8833. COOLIDGE *v.* BLOCK DRUG, INC. C. A. 8th Cir. Certiorari denied. Reported below: 105 F. 3d 662.

No. 96–8834. SETCHELL *v.* LITTLE SIX, INC. Sup. Ct. Minn. Certiorari denied.

No. 96–8835. BROWN *v.* NETHERLAND, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 107 F. 3d 865.

No. 96–8839. BOND *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 345 N. C. 1, 478 S. E. 2d 163.

No. 96–8840. WASHINGTON *v.* OAKLAND UNIFIED SCHOOL DISTRICT. C. A. 9th Cir. Certiorari denied. Reported below: 112 F. 3d 518.

No. 96–8841. CADEJUSTE *v.* WELCH, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 106 F. 3d 389.

No. 96–8843. DICESARE *v.* COWLEY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 99 F. 3d 1149.

No. 96–8848. BATES *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 96–8852. CURTIS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 685 So. 2d 1234.

No. 96–8854. VISCIOTTI *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 14 Cal. 4th 325, 926 P. 2d 987.

No. 96–8856. ELEY *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 77 Ohio St. 3d 174, 672 N. E. 2d 640.

No. 96–8872. SMITH *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 932 P. 2d 521.

No. 96–8880. KOVACIK *v.* HACKEL ET AL. C. A. 6th Cir. Certiorari denied.

No. 96–8881. MARR *v.* WRIGHT, SUPERINTENDENT, CLALLAM BAY CORRECTIONAL FACILITY. C. A. 9th Cir. Certiorari denied. Reported below: 103 F. 3d 139.

No. 96–8884. LACHICA *v.* MEDICAL COLLEGE OF WISCONSIN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 101 F. 3d 110.

No. 96–8886. BELL *v.* HUNT, GOVERNOR OF NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 103 F. 3d 116.

No. 96–8890. RODRIGUEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 96–8896. FABIAN *v.* METROPOLITAN DADE COUNTY ET AL. C. A. 11th Cir. Certiorari denied.

No. 96–8923. BLAISDELL *v.* PENAROSA, ACTING WARDEN. Sup. Ct. Haw. Certiorari denied.

No. 96–8938. PETERSON *v.* SHANKS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 107 F. 3d 21.

No. 96–8939. BARBARY *v.* STURM ET AL. Ct. App. Wis. Certiorari denied. Reported below: 207 Wis. 2d 642, 559 N. W. 2d 924.

No. 96–8941. SINGH *v.* COMMISSIONER OF SOCIAL SERVICES, CITY OF NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 231 App. Div. 2d 573, 648 N. Y. S. 2d 612.

No. 96–8956. OWENS *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 96–8959. LONGFELLOW *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 688 A. 2d 1370.

No. 96–9015. WALKER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 933 P. 2d 327.

No. 96–9020. WHYTE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 228 App. Div. 2d 395, 645 N. Y. S. 2d 292.

No. 96–9036. GREER *v.* PARKE, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied. Reported below: 107 F. 3d 873.

No. 96–9049. ARTEAGA *v.* TEXAS DEPARTMENT OF PROTECTIVE AND REGULATORY SERVICES. Sup. Ct. Tex. Certiorari denied.

No. 96–9067. Bair *v.* Brown, Secretary of Veterans Affairs. C. A. Fed. Cir. Certiorari denied. Reported below: 101 F. 3d 716.

No. 96–9069. Simon *v.* Mississippi. Sup. Ct. Miss. Certiorari denied. Reported below: 688 So. 2d 791.

No. 96–9092. Thomas *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 109 F. 3d 765.

No. 96–9094. Schwarz *v.* Merit Systems Protection Board. C. A. Fed. Cir. Certiorari denied. Reported below: 108 F. 3d 1392.

No. 96–9103. Dorlouis et al. *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 107 F. 3d 248.

No. 96–9114. Lauti *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied. Reported below: 102 F. 3d 166.

No. 96–9122. Arroyo *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 112 F. 3d 505.

No. 96–9127. Russell *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 109 F. 3d 1503.

No. 96–9128. Schweitzer *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 107 F. 3d 9.

No. 96–9130. Martinez *v.* Slater, Secretary of Transportation. C. A. 10th Cir. Certiorari denied.

No. 96–9132. Isenberg *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 111 F. 3d 128.

No. 96–9133. Ries *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 106 F. 3d 410.

No. 96–9134. Olivares-Sevilla *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 103 F. 3d 142.

No. 96–9137. Bannister *v.* Bowersox, Superintendent, Potosi Correctional Center. C. A. 8th Cir. Certiorari denied. Reported below: 100 F. 3d 610.

No. 96–9145. Bramson *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 107 F. 3d 868.

No. 96–9149. McDonald *v.* Bowersox, Superintendent, Potosi Correctional Center. C. A. 8th Cir. Certiorari denied. Reported below: 101 F. 3d 588.

No. 96–9150. Nagib *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 106 F. 3d 404.

No. 96–9151. Medina-Alfonso *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 109 F. 3d 770.

No. 96–9159. Austin *v.* Lucht, Warden, et al. C. A. 3d Cir. Certiorari denied. Reported below: 106 F. 3d 384.

No. 96–9162. Jennings *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 107 F. 3d 876.

No. 96–9164. Jones *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 107 F. 3d 1147.

No. 96–9165. Haut *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 107 F. 3d 864.

No. 96–9168. Hathcock *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 103 F. 3d 715.

No. 96–9171. Fernandez-Roque *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 107 F. 3d 868.

No. 96–9172. Haut *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 107 F. 3d 213.

No. 96–9173. Hamilton *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 107 F. 3d 499.

No. 96–9174. Draves *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 103 F. 3d 1328.

No. 96–9175. Collins *v.* Farmers Home Administration et al. C. A. 11th Cir. Certiorari denied. Reported below: 105 F. 3d 1366.

No. 96–9179. Scroggins *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 107 F. 3d 868.

No. 96–9181. MERRICK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 107 F. 3d 868.

No. 96–9185. STARNES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 109 F. 3d 648.

No. 96–9186. POLANCO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 112 F. 3d 505.

No. 96–9189. BOYLESS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 101 F. 3d 702.

No. 96–9193. WARE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 110 F. 3d 66.

No. 96–9199. SCOTT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 104 F. 3d 357.

No. 96–9205. BINFORD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 108 F. 3d 723.

No. 96–9206. BECKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 107 F. 3d 863.

No. 96–9207. SANFORD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 109 F. 3d 769.

No. 96–9208. SATZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 105 F. 3d 956.

No. 96–9209. OWENS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 109 F. 3d 771.

No. 96–9212. STEWART *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 107 F. 3d 872.

No. 96–9213. ROGERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 109 F. 3d 765.

No. 96–9222. EDMONSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 107 F. 3d 22.

No. 96–9225. EVERETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 109 F. 3d 768.

No. 96–9237. TINSLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 107 F. 3d 871.

No. 96–9239. WILLIAMS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 108 F. 3d 1375.

No. 96–31. SMITH *v.* CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION ET AL. Sup. Ct. Cal. Motions of American Jewish Congress et al. and Defenders of Property Rights for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 12 Cal. 4th 1143, 913 P. 2d 909.

No. 96–174. ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW ET AL. *v.* FOSTER, GOVERNOR OF LOUISIANA, ET AL. C. A. 5th Cir. Motion of Public Citizen for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 81 F. 3d 1387.

No. 96–1231. E. I. DU PONT DE NEMOURS & CO. *v.* SHERIDAN. C. A. 3d Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 100 F. 3d 1061.

No. 96–1591. CALDERON, WARDEN *v.* SILVA. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 106 F. 3d 409.

No. 96–1719. GALLO ET AL. *v.* AMOCO CORP., AS PLAN ADMINISTRATOR, ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 102 F. 3d 918.

No. 96–1755. CALDERON, WARDEN *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA (HAYES, REAL PARTY IN INTEREST). C. A. 9th Cir. Motion of Criminal Justice Legal Foundation for leave to file a brief as *amicus curiae* granted. Motion of respondent Blufford Hayes, Jr., for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 103 F. 3d 72.

Rehearing Denied

No. 96–1160. RICHARDSON *v.* ALBERTSON'S, INC., 520 U. S. 1196;

No. 96–1390. EVANS, BY HER MOTHER AND NEXT FRIEND, EVANS *v.* AVERY ET AL., 520 U. S. 1210;

No. 96–1399. UNITED STATES EX REL. HAYCOCK *v.* HUGHES AIRCRAFT CO., 520 U. S. 1211;

No. 96–7555. SIDLES *v.* LEWIS ET AL., 520 U. S. 1146;

No. 96–7565. WILLIAMS ET UX. *v.* UNITED STATES ET AL., 520 U. S. 1188;

No. 96–7849. HARRIS *v.* CUYAHOGA COUNTY, OHIO, ET AL., 520 U. S. 1174;

No. 96–8015. GOLDEN *v.* TEXAS, 520 U. S. 1176;

No. 96–8046. MCREYNOLDS *v.* VENKATARAGHAVEN ET AL., 520 U. S. 1200;

No. 96–8175. HENRY *v.* WILLIAMSON ET AL., 520 U. S. 1216;

No. 96–8265. TAYLOR *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 520 U. S. 1201;

No. 96–8273. SISK *v.* TEXAS, 520 U. S. 1232; and

No. 96–8604. PARKER *v.* UNITED STATES, 520 U. S. 1223. Petitions for rehearing denied.

JUNE 30, 1997

Certiorari Denied

No. 97–5020 (A–8). MCQUEEN *v.* KENTUCKY. Sup. Ct. Ky. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. Reported below: 948 S. W. 2d 415.

No. 97–5021 (A–10). MCQUEEN *v.* PATTON, GOVERNOR OF KENTUCKY. C. A. 6th Cir. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. Reported below: 118 F. 3d 460.

No. 97–5030 (A–2). MCQUEEN *v.* KENTUCKY. Sup. Ct. Ky. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. Reported below: 949 S. W. 2d 70.

No. 97–5039 (A–12). MCQUEEN *v.* SAPP, COMMISSIONER, KENTUCKY DEPARTMENT OF CORRECTIONS, ET AL. C. A. 6th Cir. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS would grant the application for stay of execution and the petition for writ of certiorari. Reported below: 118 F. 3d 460.

Rehearing Denied

No. 96–8750 (A–7). McQueen *v.* Parker, Warden, 520 U. S. 1257. Application for stay of execution of sentence of death, presented to Justice Stevens, and by him referred to the Court, denied. Petition for rehearing denied.

July 1, 1997

Miscellaneous Order

No. 97–5019 (A–6). In re Hunt. Application for stay of execution of sentence of death, presented to The Chief Justice, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 96–9160 (A–862). Hunt *v.* Maryland. Ct. App. Md. Application for stay of execution of sentence of death, presented to The Chief Justice, and by him referred to the Court, denied. Certiorari denied. Reported below: 345 Md. 122, 691 A. 2d 1255.

July 3, 1997

Miscellaneous Order

No. 96–1400 (A–925). California et al. *v.* Deep Sea Research, Inc., et al. C. A. 9th Cir. [Certiorari granted, 520 U. S. 1263.] Application for stay, presented to Justice O'Connor, and by her referred to the Court, denied.

July 16, 1997

Miscellaneous Order

No. A–904. Prewitt *v.* Alexander et al. C. A. 5th Cir. Application for stay, addressed to Justice Stevens and referred to the Court, denied.

July 17, 1997

Certiorari Denied

No. 97–5106 (A–49). Smith *v.* Angelone, Director, Virginia Department of Corrections. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to The Chief Justice, and by him referred to the Court, denied. Certiorari denied. Justice Stevens and Justice Ginsburg would grant the application for stay of execution. Reported below: 111 F. 3d 1126.

July 23, 1997

Miscellaneous Order

No. 97–5311 (A–76). In re O'Dell. Application for stay of execution of sentence of death, presented to The Chief Justice, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 97–5300 (A–74). O'Dell *v.* Allen, Governor of Virginia, et al. C. A. 4th Cir. Application for injunction staying the execution of sentence of death, presented to The Chief Justice, and by him referred to the Court, denied. Certiorari denied.

July 25, 1997

Dismissal Under Rule 46

No. 96–1880. Anello *v.* Zoning Board of Appeals of Village of Dobbs Ferry et al. Ct. App. N. Y. Certiorari dismissed under this Court's Rule 46.1. Reported below: 89 N. Y. 2d 535, 678 N. E. 2d 870.

July 29, 1997

Miscellaneous Order

No. 97–5381 (A–85). In re West. Application for stay of execution of sentence of death, presented to Justice Scalia, and by him referred to the Court, denied. Petition for writ of habeas corpus and petition for review denied.

Certiorari Denied

No. 97–5348 (A–78). West *v.* Texas. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to Justice Scalia, and by him referred to the Court, denied. Certiorari denied.

No. 97–5406 (A–89). West *v.* Texas Board of Pardons and Paroles et al. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to Justice Scalia, and by him referred to the Court, denied. Certiorari denied.

Rehearing Denied

No. 96–7332 (A–82). West *v.* Johnson, Director, Texas Department of Criminal Justice, Institutional Division, 520 U. S. 1242. Application for stay of execution of sentence of death, presented to Justice Scalia, and by him referred to the Court, denied. Petition for rehearing denied.

August 1, 1997

Miscellaneous Order

No. 97–197. In re Calderon, Warden. Motion of petitioner to proceed with 8½- by 11-inch paper granted. Motion of petitioner to expedite consideration of petition for writ of mandamus granted. Petition for writ of mandamus denied.

August 4, 1997

Miscellaneous Orders

No. D–1803. In re Disbarment of Schwartz. Disbarment entered. [For earlier order herein, see 520 U. S. 1208.]

No. D–1804. In re Disbarment of Cooley. Disbarment entered. [For earlier order herein, see 520 U. S. 1208.]

No. D–1813. In re Disbarment of Weisman. David S. Weisman, of Los Angeles, Cal., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to the practice of law before this Court. The rule to show cause, issued on June 23, 1997 [*ante*, p. 1101], is discharged.

No. D–1819. In re Disbarment of Kramer. Michael A. Kramer, of Casselberry, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1820. In re Disbarment of Franzen. Charles Robert Franzen, of Houston, Tex., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1821. In re Disbarment of Siddiqi. Anis Ahmad Siddiqi, of Brooklyn, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1822. In re Disbarment of Cade. Gladys Maxine B. Cade, of Silver Spring, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–1823. In re Disbarment of Baldauff. Michael Chapman Baldauff, of York, Pa., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1824. In re Disbarment of Barron. Kenneth Ray Barron, of Tyler, Tex., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1825. In re Disbarment of Hines. John H. Hines, Jr., of Smithfield, R. I., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1826. In re Disbarment of Piccirilli. Vincent J. Piccirilli, of Cranston, R. I., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1827. In re Disbarment of Tallo. Richard C. Tallo, of East Greenwich, R. I., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1828. In re Disbarment of Newell. Frank Harvey Newell III, of Towson, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1829. In re Disbarment of Dyson. Thomas R. Dyson, Jr., of Chevy Chase, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1830. In re Disbarment of Haller. Arthur Gordon Haller, of Gainesville, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1831. In re Disbarment of Scott. Richard Scott, of Lincoln, Neb., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1832. In re Disbarment of Welcker. Ronald Alfred Welcker, of New Orleans, La., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1833. In re Disbarment of Tobin. Harris A. Tobin, of Gainesville, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1834. In re Disbarment of Apollo. Stephen Apollo, of Hackensack, N. J., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1835. In re Disbarment of Beckman. A. Thomas Beckman, of Lutherville, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1836. In re Disbarment of Zolot. Lawrence M. Zolot, of San Diego, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1837. In re Disbarment of Quinn. Anthony P. Quinn, of Queens, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1838. In re Disbarment of Crowley. Martin J. Crowley, of Smithtown, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

Certiorari Granted

No. 97–215. Calderon, Warden *v.* Thompson. C. A. 9th Cir. Motion of petitioner to proceed with 8½- by 11-inch paper granted. Motion of petitioner to expedite consideration granted. Petition for writ of mandamus denied. Treating the papers submitted as a petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit, certiorari granted limited to Questions 1 and 2 presented by the petition. Reported below: 120 F. 3d 1045.

Rehearing Denied

No. 95–1764. Saratoga Fishing Co. *v.* J. M. Martinac & Co. et al., 520 U. S. 875;

No. 96–538. Frost et al. *v.* United States, 520 U. S. 1226;

No. 96–1358. Ochoa *v.* Federal Communications Commission et al., 520 U. S. 1229;

No. 96–1534. Sweeney *v.* Schmoke, Mayor of Baltimore, et al., 520 U. S. 1251;

No. 96–1593. Hinchliffe *v.* Pennsylvania, 520 U. S. 1265;

No. 96–1664. Tin Yat Chin *v.* Department of Justice, 520 U. S. 1231;

No. 96–1700. Abidekun *v.* New York City Department of Housing Preservation and Development et al., 520 U. S. 1241;

No. 96–6480. DUTCHER *v.* MOREO ET AL., 519 U. S. 1063;

No. 96–7748. FIDIS *v.* LAKESIDE MEDICAL CENTER, 520 U. S. 1171;

No. 96–7796. SORIA *v.* TEXAS, 520 U. S. 1253;

No. 96–7937. WILKINS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 520 U. S. 1189;

No. 96–7980. RODRIGUEZ *v.* UNITED STATES, 520 U. S. 1160;

No. 96–8086. TUERK *v.* OTIS ELEVATOR CO., INC., ET AL., 520 U. S. 1214;

No. 96–8172. HALE *v.* RUNYON, POSTMASTER GENERAL, 520 U. S. 1190;

No. 96–8250. FELTROP *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, 520 U. S. 1242;

No. 96–8288. ARTEAGA *v.* SUPERIOR COURT OF CALIFORNIA, SANTA CLARA COUNTY, 520 U. S. 1233;

No. 96–8289. ARTEAGA *v.* COURT OF APPEAL OF CALIFORNIA, SIXTH APPELLATE DISTRICT, 520 U. S. 1233;

No. 96–8292. MULTANI *v.* ROSS UNIVERSITY ET AL., 520 U. S. 1233;

No. 96–8294. KEIRSEY *v.* MARYLAND, 520 U. S. 1191;

No. 96–8299. SACERIO *v.* SCHOOL BOARD OF DADE COUNTY, 520 U. S. 1242;

No. 96–8373. WERNER, AKA THOMAS *v.* MCCOTTER, EXECUTIVE DIRECTOR, UTAH DEPARTMENT OF CORRECTIONS, ET AL., 520 U. S. 1244;

No. 96–8375. GARY *v.* TURPIN, WARDEN, 520 U. S. 1244;

No. 96–8384. HOWARD *v.* HOWARD, 520 U. S. 1244;

No. 96–8428. JUDD *v.* UNIVERSITY OF NEW MEXICO ET AL., 520 U. S. 1245;

No. 96–8464. LAMBERT *v.* INDIANA, 520 U. S. 1255;

No. 96–8498. REYNOLDS *v.* LOS ANGELES COUNTY DEPARTMENT OF CHILDREN'S SERVICES, 520 U. S. 1234;

No. 96–8512. SIKORA *v.* DOE ET AL., 520 U. S. 1266;

No. 96–8532. JENKINS ET AL. *v.* OAKLEY ET AL., 520 U. S. 1256;

No. 96–8571. GRAY *v.* WOOD, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY, ET AL., 520 U. S. 1268;

No. 96–8572. HANSEN *v.* UNITED STATES, 520 U. S. 1222;

No. 96–8606. SHARP *v.* ALLSTATE INSURANCE CO. ET AL., 520 U. S. 1268;

No. 96–8618. BURGESS *v.* EASLEY MUNICIPAL ELECTION COMMISSION, 520 U. S. 1234;

No. 96–8627. NAGI *v.* C. E. FLEMING CORP. ET AL., 520 U. S. 1234;

No. 96–8637. IN RE ROBINSON, 520 U. S. 1273;

No. 96–8644. TIDIK *v.* RITSEMA ET AL., 520 U. S. 1256;

No. 96–8667. IN RE GRUBBS, 520 U. S. 1227;

No. 96–8677. BURNETT *v.* CHIPPEWA COUNTY SHERIFF'S DEPARTMENT, 520 U. S. 1279;

No. 96–8697. TROWBRIDGE *v.* UNITED STATES, 520 U. S. 1235;

No. 96–8771. STEWART *v.* UNITED STATES, 520 U. S. 1246;

No. 96–8840. WASHINGTON *v.* OAKLAND UNIFIED SCHOOL DISTRICT, *ante,* p. 1124; and

No. 96–8919. DANCER *v.* MERIT SYSTEMS PROTECTION BOARD, 520 U. S. 1280. Petitions for rehearing denied.

No. 96–79. BOGGS *v.* BOGGS ET AL., 520 U. S. 833. Motion of respondents to supplement petition for rehearing granted. Petition for rehearing denied.

No. 96–8894. ROBINSON *v.* CLINTON, PRESIDENT OF THE UNITED STATES, ET AL., 520 U. S. 1283. Petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

AUGUST 5, 1997

Miscellaneous Order

No. 97–5492 (A–107). IN RE FELTROP. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

AUGUST 6, 1997

Miscellaneous Orders

No. A–61 (97–122). CITY OF MONROE ET AL. *v.* UNITED STATES. Appeal from D. C. M. D. Ga. Application for stay of permanent injunction entered by the three judge panel of the United States District Court for the Middle District of Georgia, case No. 94–CV–45(WDO), on April 21, 1997, presented to JUSTICE KENNEDY, and by him referred to the Court, granted pending action by this Court on the statement as to jurisdiction. Should the appeal be dismissed or the judgment affirmed, this order shall terminate automatically. If probable jurisdiction is noted or postponed, this order shall continue in effect pending the sending down of the judgment of this Court. Motion to seal exhibits filed by the appellants denied.

No. A–111 (O. T. 1997). PERRY *v.* BROWNLEE ET AL. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied.

No. A–112 (O. T. 1997). PERRY *v.* MORGAN, WARDEN, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied.

No. A–114 (O. T. 1997). PERRY *v.* MORGAN, WARDEN, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied.

No. 97–5495 (A–108). IN RE PERRY. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 97–5366 (A–96). PERRY *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

AUGUST 12, 1997

Miscellaneous Order

No. 97–5464 (A–99). IN RE REESE. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

AUGUST 14, 1997

Certiorari Denied

No. 97–5246 (A–67). CORWIN *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

AUGUST 15, 1997

Miscellaneous Orders

No. A–31 (97–5078). HUNT *v.* UNITED STATES. C. A. 9th Cir. Application for bail, addressed to JUSTICE BREYER and referred to the Court, denied.

No. A–71 (96–9490). ZIGLAR *v.* ALABAMA. C. A. 11th Cir. Application for stay, addressed to JUSTICE STEVENS and referred to the Court, denied.

AUGUST 18, 1997

Dismissal Under Rule 46

No. 96–1746. HELLENIC AMERICAN NEIGHBORHOOD ACTION COMMITTEE *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 101 F. 3d 877.

AUGUST 19, 1997

Miscellaneous Order

No. 97–5637 (A–141). IN RE SIX. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 97–5343 (A–126). POPE *v.* PRUETT, WARDEN. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 113 F. 3d 1364.

No. 97–5617 (A–138). SIX *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

AUGUST 26, 1997

Miscellaneous Order

No. 97–215. CALDERON, WARDEN *v.* THOMPSON. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1136.] The order granting the petition for writ of certiorari is amended to read as follows: Motion of petitioner to proceed with 8½- by 11-inch paper granted. Motion of petitioner to expedite consideration granted. Petition for writ of mandamus denied. Treating the papers submitted as a petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit, certiorari granted limited to Questions 1 and 2 presented by the petition. In addition, the parties are directed to brief and argue the following question: "Did the Ninth Circuit, sitting en banc, err in concluding that the three-judge panel 'committed fundamental errors of law that would result in manifest injustice' sufficient to justify recalling the mandate?"

AUGUST 27, 1997

Dismissal Under Rule 46

No. 96–9376. IN RE RODDEN. Petition for writ of mandamus dismissed under this Court's Rule 46.

AUGUST 29, 1997

Miscellaneous Order

No. A–166 (97–5639). CARR *v.* GEORGIA. Sup. Ct. Ga. Application of respondent to vacate the stay of execution of sentence of death granted by the Superior Court of Monroe County on August 25, 1997, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

SEPTEMBER 3, 1997

Miscellaneous Order

No. A–98 (97–5250). MILLER *v.* CORCORAN, WARDEN, ET AL. C. A. 4th Cir. Application for bail, addressed to JUSTICE STEVENS and referred to the Court, denied.

SEPTEMBER 4, 1997

Miscellaneous Order

No. A–174 (97–369). COALITION FOR ECONOMIC EQUITY ET AL. *v.* WILSON, GOVERNOR OF CALIFORNIA, ET AL.; and

No. A–175. CITY AND COUNTY OF SAN FRANCISCO *v.* WILSON, GOVERNOR OF CALIFORNIA, ET AL. C. A. 9th Cir. Applications for stay, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied.

SEPTEMBER 9, 1997

Miscellaneous Order

No. 97–5798 (A–178). IN RE DAVIS. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied. JUSTICE STEVENS, JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER would grant the application for stay of execution.

SEPTEMBER 12, 1997

Miscellaneous Orders

No. D–1805. IN RE DISBARMENT OF SCHLOTTMAN. Disbarment entered. [For earlier order herein, see 520 U. S. 1208.]

No. D–1807. IN RE DISBARMENT OF CALVERT. Disbarment entered. [For earlier order herein, see 520 U. S. 1262.]

No. D–1810. IN RE DISBARMENT OF LASH. Disbarment entered. [For earlier order herein, see 520 U. S. 1262.]

No. D–1811. IN RE DISBARMENT OF WATKINS. Disbarment entered. [For earlier order herein, see 520 U. S. 1272.]

No. D–1812. IN RE DISBARMENT OF KAPLAN. Disbarment entered. [For earlier order herein, see *ante*, p. 1101.]

No. D–1816. IN RE DISBARMENT OF HORNE. Disbarment entered. [For earlier order herein, see *ante*, p. 1102.]

No. D–1817. IN RE DISBARMENT OF WILLIAMS. Disbarment entered. [For earlier order herein, see *ante*, p. 1115.]

No. D–1818. IN RE DISBARMENT OF SOSNAY. Disbarment entered. [For earlier order herein, see *ante*, p. 1115.]

No. D–1819. IN RE DISBARMENT OF KRAMER. Michael A. Kramer, of Casselberry, Fla., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to the practice of law before this Court. The rule to show cause, issued on August 4, 1997 [*ante*, p. 1133], is discharged.

No. 96–370. BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND *v.* FERBAR CORPORATION OF CALIFORNIA, INC., ET AL. C. A. 9th Cir. [Certiorari granted, 520 U. S. 1209.] Motions of National Coordinating Committee for Multiemployer Plans et al., Midwest Motor Express, Inc., and John T. Joyce et al. for leave to file briefs as *amici curiae* granted.

No. 96–643. STEEL CO., AKA CHICAGO STEEL & PICKLING CO. *v.* CITIZENS FOR A BETTER ENVIRONMENT. C. A. 7th Cir. [Certiorari granted, 519 U. S. 1147.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 96–792. KALINA *v.* FLETCHER. C. A. 9th Cir. [Certiorari granted, 519 U. S. 1148.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 96–843. NATIONAL CREDIT UNION ADMINISTRATION *v.* FIRST NATIONAL BANK & TRUST CO. ET AL.; and

No. 96–847. AT&T FAMILY FEDERAL CREDIT UNION ET AL. *v.* FIRST NATIONAL BANK & TRUST CO. ET AL. C. A. D. C. Cir. [Certiorari granted, 519 U. S. 1148.] Motion of the Acting Solicitor General for divided argument granted.

No. 96–1395. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT *v.* ERICKSON ET AL.; and KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT *v.* MCMANUS ET AL. C. A. Fed. Cir. [Certiorari granted, *ante*, p. 1117.] Motion of the Acting Solicitor General to dispense with printing the joint appendix granted.

No. 96–1487. UNITED STATES *v.* BAJAKAJIAN. C. A. 9th Cir. [Certiorari granted, 520 U. S. 1239.] Motion of the Acting Solicitor General to dispense with printing the joint appendix granted.

No. 96–1613. UNITED STATES *v.* ESTATE OF ROMANI. Sup. Ct. Pa. [Certiorari granted, *ante*, p. 1117.] Motion of the Acting Solicitor General to dispense with printing the joint appendix granted.

No. 96–8400. BUCHANAN *v.* ANGELONE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. [Certiorari granted, 520 U. S. 1196.] Motion of National Association of Criminal Defense Lawyers for leave to file a brief as *amicus curiae* granted.

Certiorari Denied

No. 97–5808 (A–210). MURPHY *v.* NETHERLAND, WARDEN. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 116 F. 3d 97.

Rehearing Denied

No. 84, Orig. UNITED STATES *v.* ALASKA, *ante*, p. 1;
No. 94–9498. HEMPHILL *v.* HOUSING AUTHORITY OF THE CITY OF CHARLESTON ET AL., 516 U. S. 838;
No. 96–31. SMITH *v.* CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION ET AL., *ante*, p. 1129;
No. 96–1903. ABBEY *v.* SVERDRUP CORP. ET AL., *ante*, p. 1122;
No. 96–5609. CHRISTY *v.* MAGNUSON ET AL., *ante*, p. 1122;
No. 96–7326. SCOTT *v.* NACHMAN, 520 U. S. 1107;
No. 96–7703. CARTER *v.* AMTRAK NATIONAL RAILROAD PASSENGER CORPORATION, 520 U. S. 1213;
No. 96–7878. MAXWELL *v.* TEXAS, 520 U. S. 1175;
No. 96–7929. PEREZ *v.* UNITED STATES, 520 U. S. 1175;
No. 96–7957. VEATCH *v.* UNITED STATES, 520 U. S. 1149;
No. 96–8405. VASQUEZ *v.* OFFICE OF PERSONNEL MANAGEMENT ET AL., *ante*, p. 1122;
No. 96–8483. TAPLIN *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 520 U. S. 1255;
No. 96–8491. GANGI *v.* BAYBANK, FSB, ET AL., 520 U. S. 1256;
No. 96–8534. SIDLES *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, 520 U. S. 1267;
No. 96–8535. SIDDIQUI *v.* NEW YORK, 520 U. S. 1267;
No. 96–8590. HOWARD *v.* CASPARI, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER, 520 U. S. 1234;
No. 96–8639. IN RE RODRIGUEZ, 520 U. S. 1208;
No. 96–8668. HART *v.* CALIFORNIA ET AL., 520 U. S. 1279;
No. 96–8681. BERGNE *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, 520 U. S. 1279;

No. 96–8686. CAUSEY *v.* UNITED STATES, 520 U. S. 1235;

No. 96–8699. OBERUCH *v.* ARIZONA ET AL., 520 U. S. 1279;

No. 96–8722. LEWIS *v.* SUPREME COURT OF CALIFORNIA ET AL., *ante,* p. 1106;

No. 96–8761. MCBROOM *v.* FRANKLIN COUNTY BOARD OF ELECTIONS, *ante,* p. 1107;

No. 96–8803. GRANT *v.* IN REM RELEASE BOARD ET AL., *ante,* p. 1123;

No. 96–8817. LOYER *v.* LOYER ET AL. (two judgments), *ante,* p. 1123;

No. 96–8939. BARBARY *v.* STURM ET AL., *ante,* p. 1125;

No. 96–8947. IN RE CARNEY ET AL., *ante,* p. 1117;

No. 96–9014. SMITH *v.* BILLER ET AL., *ante,* p. 1109;

No. 96–9038. ELDER *v.* MERIT SYSTEMS PROTECTION BOARD, *ante,* p. 1109;

No. 96–9046. TONEY *v.* UNITED STATES, *ante,* p. 1109;

No. 96–9071. SHORT *v.* UNITED STATES, *ante,* p. 1110;

No. 96–9073. BUNDY *v.* UNITED STATES, *ante,* p. 1110;

No. 96–9079. BURNS *v.* UNITED STATES, *ante,* p. 1110;

No. 96–9094. SCHWARZ *v.* MERIT SYSTEMS PROTECTION BOARD, *ante,* p. 1126;

No. 96–9115. BANKS *v.* UNITED STATES ET AL., *ante,* p. 1110;

No. 96–9137. BANNISTER *v.* BOWERSOX, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, *ante,* p. 1126;

No. 96–9175. COLLINS *v.* FARMERS HOME ADMINISTRATION ET AL., *ante,* p. 1127; and

No. 96–9237. TINSLEY *v.* UNITED STATES, *ante,* p. 1128. Petitions for rehearing denied.

No. 95–1184. GLICKMAN, SECRETARY OF AGRICULTURE *v.* WILEMAN BROTHERS & ELLIOTT, INC., ET AL., *ante,* p. 457. Petition of Wileman Brothers & Elliott, Inc., et al. for rehearing denied. Petition of Gerawan Farming, Inc., et al. for rehearing denied.

No. 96–9070. SMITH *v.* UNITED STATES, *ante,* p. 1110. Motion for leave to file petition for rehearing denied.

SEPTEMBER 16, 1997

Dismissal Under Rule 46

No. 97–5032. BLEDSOE *v.* UNITED STATES. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46.

SEPTEMBER 22, 1997

Dismissals Under Rule 46

No. 97–127. ST. LEDGER ET AL. *v.* KENTUCKY REVENUE CABINET ET AL. Sup. Ct. Ky. Certiorari dismissed under this Court's Rule 46.1. Reported below: 942 S. W. 2d 893.

No. 97–329. PENGUIN BOOKS USA, INC., ET AL. *v.* DR. SEUSS ENTERPRISES. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 109 F. 3d 1394.

Miscellaneous Order

No. 97–6078 (A–234). IN RE TURNER. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

SEPTEMBER 23, 1997

Miscellaneous Order

No. 97–6123 (A–239). IN RE MCDONALD. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

SEPTEMBER 24, 1997

Dismissal Under Rule 46

No. 97–5935. KESTERSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 114 F. 3d 1189.

SEPTEMBER 29, 1997

Miscellaneous Orders

No. D–1806. IN RE DISBARMENT OF MORATH. Disbarment entered. [For earlier order herein, see 520 U. S. 1262.]

No. D–1808. IN RE DISBARMENT OF KIRK. Disbarment entered. [For earlier order herein, see 520 U. S. 1262.]

No. D–1815. IN RE DISBARMENT OF BARNES. Brenda Powers Barnes, of Santa Monica, Cal., having requested to resign as a member of the Bar of this Court, it is ordered that her name be stricken from the roll of attorneys admitted to the practice of law before this Court. The rule to show cause, issued on June 23, 1997 [*ante*, p. 1102], is discharged.

No. D–1820. In re Disbarment of Franzen. Disbarment entered. [For earlier order herein, see *ante*, p. 1133.]

No. D–1824. In re Disbarment of Barron. Disbarment entered. [For earlier order herein, see *ante*, p. 1134.]

No. D–1826. In re Disbarment of Piccirilli. Disbarment entered. [For earlier order herein, see *ante*, p. 1134.]

No. D–1828. In re Disbarment of Newell. Disbarment entered. [For earlier order herein, see *ante*, p. 1134.]

No. D–1829. In re Disbarment of Dyson. Disbarment entered. [For earlier order herein, see *ante*, p. 1135.]

No. D–1834. In re Disbarment of Apollo. Disbarment entered. [For earlier order herein, see *ante*, p. 1135.]

No. D–1835. In re Disbarment of Beckman. Disbarment entered. [For earlier order herein, see *ante*, p. 1135.]

No. D–1839. In re Disbarment of Saranello. Joseph Anthony Saranello, of Houston, Tex., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1840. In re Disbarment of Gilbert. Ronald Bart Gilbert, of Miami, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1841. In re Disbarment of Segal. Theodore Joseph Segal, of Phoenix, Ariz., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1842. In re Disbarment of Steward. Harrison B. Steward III, of Orlando, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1843. In re Disbarment of Tuccori. Lawrence Stanley Tuccori, of Fresno, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1844. In re Disbarment of Davis. James Herman Davis, of Los Angeles, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1845. In re Disbarment of Kadish. Charles Kadish, of Buffalo Grove, Ill., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1846. In re Disbarment of Jackson. Andrew D. Jackson, of Whiting, Ind., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1847. In re Disbarment of Wolhar. Robert C. Wolhar, Jr., of Georgetown, Del., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1848. In re Disbarment of Gilleran. Robert Thomas Gilleran, of Los Angeles, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1849. In re Disbarment of Pickett. Neal Yarborough Pickett, of Houston, Tex., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1850. In re Disbarment of Marcus. Lyn H. Marcus, of Los Angeles, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1851. In re Disbarment of Smith. Nicholas Smith, of Plymouth, Mich., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1852. In re Disbarment of Greene. Lawrence R. Greene, of Detroit, Mich., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1853. In re Disbarment of Thornton. Kenneth W. Thornton, Jr., of Georgetown, S. C., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1854. In re Disbarment of Fisher. Robert Patrick Fisher, of Scotts Valley, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1855. In re Disbarment of Hopewell. Richard James Hopewell, of Sioux Falls, S. D., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 120, Orig. New Jersey *v.* New York. Motions of the National Trust for Historic Preservation in the United States et al., New York Landmarks Conservancy et al., and New York Historical Society et al. for leave to file briefs as *amici curiae* granted. Exceptions to the Report of the Special Master are set for oral argument in due course. Motion of New York for leave to file a surreply brief denied. [For earlier order herein, see, *e. g., ante,* p. 1116.]

No. 96–188. General Electric Co. et al. *v.* Joiner et ux. C. A. 11th Cir. [Certiorari granted, 520 U. S. 1114.] Motions of Ardith Cavallo and Association of Trial Lawyers of America for leave to file briefs as *amici curiae* granted.

No. 96–370. Bay Area Laundry and Dry Cleaning Pension Trust Fund *v.* Ferbar Corporation of California, Inc., et al. C. A. 9th Cir. [Certiorari granted, 520 U. S. 1209.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 96–976. Hudson et al. *v.* United States. C. A. 10th Cir. [Certiorari granted, 520 U. S. 1165.] Motion of Ohio et al. for leave to participate in oral argument as *amici curiae* denied.

No. 96–1291. Oubre *v.* Entergy Operations, Inc. C. A. 5th Cir. [Certiorari granted, 520 U. S. 1185.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 96–1337. County of Sacramento et al. *v.* Lewis et al., Personal Representatives of the Estate of Lewis, Deceased. C. A. 9th Cir. [Certiorari granted, 520 U. S. 1250.] Motion of Criminal Justice Legal Foundation for leave to file a brief as *amicus curiae* granted.

No. 96–1395. King, Director, Office of Personnel Management *v.* Erickson et al.; and King, Director, Office of Personnel Management *v.* McManus et al. C. A. Fed. Cir. [Certiorari granted, *ante,* p. 1117.] Motion of International Association of Chiefs of Police, Inc., for leave to file a brief as *amicus curiae* granted.

No. 96–1469. United States *v.* Ramirez. C. A. 9th Cir. [Certiorari granted, *ante,* p. 1103.] Motion of the Acting Solicitor General to dispense with printing the joint appendix granted.

No. 96–1482. Lexecon Inc. et al. *v.* Milberg Weiss Bershad Hynes & Lerach et al. C. A. 9th Cir. [Certiorari granted, 520 U. S. 1227.] Motion of respondent Joseph W. Cotchett et al. for divided argument denied.

Probable Jurisdiction Noted

No. 97–29. Texas *v.* United States et al. Appeal from D. C. D. C. Probable jurisdiction noted. Brief of appellant is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 13, 1997. Brief of appellees is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 15, 1997. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, January 5, 1998. This Court's Rule 29.2 does not apply.

Certiorari Granted

No. 96–1584. Campbell *v.* Louisiana. Ct. App. La., 3d Cir. Certiorari granted limited to Question 1 presented by the petition. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 13, 1997. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 15, 1997. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, January 5, 1998. This Court's Rule 29.2 does not apply. Reported below: 673 So. 2d 1061.

No. 96–1693. Hopkins, Warden *v.* Reeves. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions 1, 2, and 4 presented by the petition. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 13, 1997. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 15, 1997. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, January 5, 1998. This Court's Rule 29.2 does not apply. Reported below: 102 F. 3d 977.

No. 96–1768. Feltner *v.* Columbia Pictures Television, Inc. C. A. 9th Cir. Certiorari granted. In addition to the questions presented by the petition, the parties are requested to brief and argue the following question: "Whether 17 U. S. C. § 504(c) permits or requires a jury trial in actions for statutory damages for copyright infringement." Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 13, 1997. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 15, 1997. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, January 5, 1998. This Court's Rule 29.2 does not apply. Reported below: 106 F. 3d 284.

No. 96–1923. Cohen *v.* de la Cruz et al. C. A. 3d Cir. Certiorari granted. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 13, 1997. Brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 15, 1997. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, January 5, 1998. This Court's Rule 29.2 does not apply. Reported below: 106 F. 3d 52.

No. 96–1925. Caterpillar Inc. *v.* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, et al. C. A. 3d Cir. Certiorari granted. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 13, 1997. Brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 15, 1997. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, January 5, 1998. This Court's Rule 29.2 does not apply. Reported below: 107 F. 3d 1052.

No. 96–1971. Rivet et al. *v.* Regions Bank of Louisiana et al. C. A. 5th Cir. Certiorari granted. Brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 13, 1997. Brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 15, 1997. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, January 5, 1998. This Court's Rule 29.2 does not apply. Reported below: 108 F. 3d 576.

No. 96–8516. Bousley *v.* Brooks, Warden. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 13, 1997. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 15, 1997. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, January 5, 1998. This Court's Rule 29.2 does not apply. Reported below: 97 F. 3d 284.

No. 97–115. KAWAAUHAU ET VIR *v.* GEIGER. C. A. 8th Cir. Certiorari granted. Brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 13, 1997. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 15, 1997. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, January 5, 1998. This Court's Rule 29.2 does not apply. Reported below: 113 F. 3d 848.

OCTOBER 1, 1997

Miscellaneous Order

No. M–9 (A–248). ADANANDUS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. Motion to direct the Clerk to file petition for writ of certiorari out of time denied. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

Certiorari Denied

No. 97–6231 (A–253). ADANANDUS *v.* JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS, 1994, 1995 AND 1996

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
	1994	**1995**	**1996**	**1994**	**1995**	**1996**	**1994**	**1995**	**1996**	**1994**	**1995**	**1996**
Number of cases on dockets	11	11	6	2,515	2,456	2,430	5,574	5,098	5,165	8,100	7,565	7,602
Number disposed of during term	2	5	2	2,154	2,081	2,083	4,976	4,511	4,606	7,132	6,597	6,691
Number remaining on dockets	9	6	5	361	375	347	598	587	559	968	968	907

	TERMS		
	1994	**1995**	**1996**
Cases argued during term	94	90	90
Number disposed of by full opinions	91	87	87
Number disposed of by per curiam opinions	3	3	3
Number set for reargument	0	0	0
Cases granted review this term	96	106	88
Cases reviewed and decided without oral argument	[1] 69	[2] 120	83
Total cases to be available for argument at outset of following term	39	52	48

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[1] Includes S–1.

[2] Does not include 94–1412, denied May 30, 1995.

JUNE 27, 1997

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